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Supreme Court of the United States

October Term, 1996

PUEBLO OF SANTA ANA, PUEBLO OF SAN JUAN, PUEBLO OF TESUQUE, PUEBLO OF ACOMA, PUEBLO OF SANDIA, PUEBLO OF ISLETA, PUEBLO OF POJOAQUE, SAN FELIPE GAMING ENTERPRISE BOARD, and PUEBLO OF TAOS,

Petitioners,

v.

JOHN J. KELLY, in his official capacity as United States Attorney for the District of New Mexico; JANET RENO, Attorney General of the United States; BRUCE BABBITT, United States Secretary of the Interior; the UNITED STATES of AMERICA; and the STATE of NEW MEXICO,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"), a *post hoc* challenge to the validity of a state's agreement to an approved tribal-state gaming compact may be adjudicated directly in the courts, or must first be made to the Secretary of the Interior.

2. Whether under IGRA, a tribal-state compact that has been approved by the Secretary of the Interior and that is in effect may be judicially invalidated on the basis of a subsequent court determination that there was a state law defect in the state's agreement to the compact.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings in the court below are named in the caption of the case. All of the Pueblo parties are federally recognized Indian tribal governments with the exception of the San Felipe Gaming Enterprise Board, which is a tribal enterprise wholly owned by the Pueblo of San Felipe, a federally recognized Indian tribal government. All of the respondents are federal officials or federal and state governments.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Pueblo of Santa Ana, Pueblo of San Juan, Pueblo of Tesuque, Pueblo of Acoma, Pueblo of Sandia, Pueblo of Isleta, Pueblo of Pojoaque, San Felipe Gaming Enterprise Board and Pueblo of Taos, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled action on January 10, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit, entered on January 10, 1997, is reported at 104 F.3d 1546, and is reprinted in the Appendix hereto at pages 1a through 33a. The opinion of the District Court for the District of New Mexico, entered on July 12, 1996, is reported at 932 F.Supp. 1284, and is reprinted in the Appendix at 35a through 67a.

BASIS FOR JURISDICTION

The judgment and opinion of the Court of Appeals were entered on January 10, 1997. This petition for writ of certiorari is filed on April 10, 1997, within 90 days of January 10, 1997. This court has jurisdiction to review the final judgment of the Court of Appeals for the Tenth Circuit under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves construction and interpretation of various portions of 25 U.S.C. § 2710(d), which is set forth in full in the Appendix, at 82a through 90a.

STATEMENT OF THE CASE

A. Background.

Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA") in 1988, to foster "tribal economic development, self-sufficiency, and strong tribal governments," through revenues derived from tribal gaming enterprises. 25 U.S.C. § 2702(1). To accommodate state concerns about Indian gaming, but in a manner that shows respect for tribal sovereignty and tribal immunity from state laws, Congress required that a tribe wishing to conduct "class III" gaming (most forms of gaming other than bingo and pull tabs) must enter into a compact with the state, setting forth the regulatory provisions under which such gaming is to be conducted. The compact does not take effect, however, until the Secretary of the Interior has approved it. *Id.* at § 2710(d)(3)(B). In deciding whether to approve a compact the Secretary must determine whether the compact violates any provision of IGRA or any other federal law, or the federal trust obligations toward the Indian people. *Id.* at § 2710(d)(8)(B).

From the time IGRA was enacted, New Mexico Indian tribes sought to negotiate class III gaming compacts with the State. Although negotiations with two tribes in 1990 appeared to be successful, then-Governor King refused to sign the compacts that had been agreed to, or to resume negotiations, and litigation ensued. *Ponca*

Tribe v. Oklahoma, 37 F.3d 1422 (10th Cir. 1994), *vacated*, 116 S.Ct. 1410 (1995). Out of frustration with the State's recalcitrance, several tribes began limited class III gaming activity anyway. The local United States Attorney entered into written non-prosecution agreements with the tribes under which they could continue to engage in that gaming, so long as they did not expand beyond specified limits and complied with various reporting and other conditions.

In the 1994 New Mexico gubernatorial election the topic of tribal gaming compacts was a prominent campaign issue. Gary Johnson, who promised to negotiate and sign compacts, defeated Governor King, and compacts were signed with 13 tribes on February 13, 1995. The Secretary approved twelve of those compacts on March 15, 1995, and notice of approval was published on March 22, 1995. 60 Fed. Reg. 15194 (1995).[1] With the publication of that notice, those compacts "took effect." 25 U.S.C. § 2710(d)(3)(B).

In reliance on their approved compacts, tribes that had not already commenced gaming activities began developing gaming facilities, and those that had existing facilities expanded them and substantially upgraded their gaming activities, borrowing and investing many millions of dollars in the process. In addition, virtually all of the tribes began planning and making commitments for

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[1] For reasons beyond the Pueblo's control, the compact between the State and the Pueblo of Acoma was not approved by the Secretary until April 24, 1995. Notice of that approval was published on May 15, 1995. 60 Fed. Reg. 25,978 (1995).

infrastructure development, commencement of new programs for tribal members, and other undertakings.[2] Construction of senior centers, youth recreation facilities and clinics, staffing and equipping of police forces and other governmental agencies, and additional creation, expansion and upgrading of governmental services began in earnest, all of it in express reliance on gaming revenues.

B. The *Clark* Decision.

After the compacts had taken effect, three antigambling activists filed an original proceeding in the New Mexico Supreme Court against Governor Johnson, seeking to invalidate the compacts on the ground that the Governor lacked authority under state law to execute the compacts on behalf of the State. Neither the tribes nor the United States were parties to the case, *cf. Kickapoo Tribe v.*

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[2] Among the commitments made by the tribes in reliance on gaming revenues was a contract signed by the Pueblo of Taos for the purchase of a 14,471-acre ranch, for a price of over $9 million, to establish a buffer against residential development encroaching upon the Pueblo's sacred Blue Lake Wilderness, which had been returned to it by Congress in 1970. Pub. L. No. 91-550, 84 Stat. 1437 (1970). The Pueblo of San Felipe, which never before had engaged in any kind of tribal commercial enterprise, borrowed more than $17 million to finance the construction of its gaming facility, purchase equipment and pay other start-up costs. The Pueblo of Tesuque spent more than $4 million on equipment and construction of a new facility, and committed revenues to establish tribal scholarships, to fund a day school, an elders program, and an environmental conservation program, and to reconstruct the Pueblo's plaza, at a cost of several million dollars. Other tribes entered into similar undertakings.

Babbitt, 43 F.3d 1491 (D.C. Cir. 1995) (state was indispensable party to suit seeking declaration of validity of tribal-state compact), nor did the New Mexico Attorney General participate. The Supreme Court received briefs, but no evidence other than the verified petition and a few exhibits, and heard one hour of argument. On July 13, 1995, the court ruled that the Governor lacked authority to sign the compacts on behalf of the state, and that they were therefore "without legal effect." *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995); Appendix (hereinafter, "App.") at 91a. The court rejected out of hand the argument that the Governor's authority could be found in two different state statutes that the state Attorney General had relied on in a letter opinion advising Governor King that he could sign the compacts negotiated in 1990. It entered an order prohibiting the Governor and any other state official from taking any action "to enforce, implement or enable" the compacts. 120 N.M. at 578, 904 P.2d at 27; App. at 123a.

The United States took no action to halt tribal gaming activities following the *Clark* decision, nor did the State ask the Secretary to review his approval of the compacts. After a subsequent decision by the state Supreme Court, however, in which, in dictum buried in a footnote, the court questioned whether there was any state law basis for the tribal gaming being conducted under the compacts, *Citation Bingo, Ltd. v. Otten*, 112 N.M. 205, 207 n.2, 910 P.2d 281, 283 n.2 (1995), the United States Attorney notified the gaming tribes in December, 1995 that he viewed their gaming activities as being in violation of IGRA, and directed that they cease class III gaming or

face federal enforcement action. Nine of the tribes elected to institute this litigation instead.

C. Proceedings Below.

On January 2, 1996, Petitioner Tribes filed suit in United States District Court, seeking a determination that their gaming activities, conducted in conformance with their approved compacts, fully comply with federal law. Jurisdiction was founded on 28 U.S.C. § 1331, in that the claim arose from federal law, to wit, the IGRA.[3] The United States counterclaimed for a judgment that the Tribes' gaming activities are in violation of IGRA, and it impleaded the State of New Mexico as an additional counterdefendant. Following extensive discovery, the Tribes and the United States filed cross-motions for summary judgment on all claims. The United States agreed with the Tribes that the compacts are in effect by virtue of their approval by the Secretary, but it argued that the Tribes' gaming activities are nevertheless illegal because they are not permitted under state law.[4] The State supported the United States' claim that the Tribes' gaming

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[3] A claim was also stated under the Fifth Amendment to the Constitution, inasmuch as the federal enforcement action threatened vested property rights, specifically, the Tribes' rights to engage in class III gaming under their compacts.

[4] The United States' argument was that New Mexico does not "permit" any other "person, organization or entity" to engage in the types of gaming authorized by the Tribes' compacts, and that thus, regardless of the compacts' validity, the Tribes cannot lawfully conduct such gaming under 25 U.S.C. § 2710(d)(1)(B). This novel argument was not addressed by either the District Court or the Court of Appeals.

activities are illegal, and it argued that the compacts are void on the basis of the *Clark* decision.

On July 12, 1996 the District Court ruled that the compacts are invalid based on the New Mexico Supreme Court's decision in *Clark*. The District Court granted a stay of its decision pending appeal in a memorandum decision issued on July 25, 1996. App. at 68a. The Tribes filed their Notice of Appeal the same day.

The Tenth Circuit Court of Appeals expedited the proceedings on appeal, and on January 10, 1997, that court affirmed the District Court, holding that the State was entitled to make its own decision whether its assent to the compacts is valid or binding under New Mexico law, regardless of the Secretary's role in determining the validity of the compact under IGRA. The court viewed the Secretary's approval function as ministerial, and gave central weight to the state court's *post hoc* determination of the Governor's lack of authority. And that determination, the court emphasized, was purely one of state law.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT UNRESOLVED QUESTION OF NATIONAL SIGNIFICANCE CONCERNING THE POWER OF THE COURTS TO CIRCUMVENT THE SECRETARY'S CONGRESSIONALLY MANDATED AUTHORITY OVER APPROVAL OF TRIBAL-STATE GAMING COMPACTS.

By sanctioning unrestricted collateral attacks upon the Secretary of the Interior's approval of tribal-state

class III gaming compacts under IGRA, the decision below jeopardizes every tribal-state compact that has been approved by the Secretary since IGRA was enacted. It permits belatedly raised state law issues to override the scheme of prompt federal consideration and approval of compacts, thereby circumventing the primacy of the Secretary in deciding the crucial question of compact validity.

In both courts below, the Secretary urged that any post-approval challenge to the effectiveness of a state's agreement to a compact must first be presented to the Secretary by way of a request for reconsideration of his approval. The Court of Appeals ruling, however, misconstrued the statute in a way that gives every citizen of every state that has previously entered into a tribal-state compact under IGRA license to seek judicial invalidation of the compact on the basis of some claimed state law defect in the state's concurrence. That ruling undermines the effect of the Secretary's approval and his inherent authority to reconsider that approval in light of new or changed circumstances. It also seriously undermines tribal reliance on approved compacts.

This case is not the first, and will most certainly not be the last, of such challenges to approved compacts.[5]

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[5] In *Kickapoo Tribe v. Babbitt*, 827 F.Supp. 37 (D.D.C. 1993), *vacated*, 43 F.3d 1491 (D.C.Cir. 1995), the tribe sued the Secretary seeking a declaration that the tribe's compact was valid, after the Secretary had refused to act on the compact in the face of a state court challenge to the Governor's authority to sign the compact. The district court held that the Governor's lack of authority meant that there was no compact before the Secretary

Contrary to the Court of Appeals' assurance that such challenges "are made quickly and resolved promptly," 104 F.3d at 1556, App. at 26A, recent events in Kansas and Arizona indicate that the decision below has declared an open season on all tribal-state compacts, regardless of vintage.

Tribal-state gaming compacts were approved by the Kansas legislature more than a year ago, but on February 28, 1997, shortly after the Court of Appeals issued its decision in this case, an action was filed in state district court in Kansas claiming that the Kansas compacts violate the state constitution. *Bartelli v. Graves*, No. 97-CV-183

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for approval, but the court of appeals vacated that decision, ruling that the State of Kansas was an indispensable party to the case that could not be joined. Subsequently, two challenges to compact validity arose in the Fifth Circuit, both of which were rejected. *Willis v. Fordyce*, 850 F.Supp. 523 (S.D.Miss. 1994), *aff'd*, 55 F.3d 633 (5th Cir. 1996); *Langley v. Edwards*, 872 F.Supp. 1531 (W.D.La. 1995), *aff'd*, 77 F.3d 479 (5th Cir. 1996). Both courts held, among other things, that Secretarial approval of the compacts at issue was conclusive of the compacts' validity, notwithstanding claims that the Governor in each instance had lacked authority to sign the compacts. Finally, in *Rhode Island v. Narragansett Indian Tribe*, No. 94-0619-T (D.R.I., Feb. 13, 1996), the court held that an approved compact was invalid, as here, on the basis of a state supreme court decision holding that the Governor had lacked authority to execute the compact. *Narragansett Indian Tribe v. Rhode Island*, 667 A.2d 280 (R.I. 1995). The conflicting decisions among the courts, besides constituting a separate reason why this Court should hear this case, illustrate the legal chaos in which tribes are likely to find themselves if the decision below stands.

(Shawnee Co.Dist.Ct., filed Feb. 28, 1997).[6] Shortly before that suit was filed, an original action was filed in the Arizona Supreme Court challenging a state statute (enacted by a statewide initiative) directing the Governor to sign a compact with the Salt River Pima-Maricopa Indian Community on terms identical to those that had been entered into with 16 other Arizona tribes in compacts that were approved in 1993. The petition in the Arizona case asserted that the statute, and the 16 approved compacts, violate the Arizona constitution because they allow tribes to engage in gaming on terms not available to others in the state. *Sears v. Symington*, No. CV 96-0650-SA (Ariz.Sup.Ct., Feb. 12, 1997). The petition was dismissed on jurisdictional grounds, but the issue may yet be litigated.

The decision below invites many more such challenges, and affords no protection to the Secretary's approval. *Cf. Olivar v. United States Immigr. & Naturalization Svce.*, 967 F.2d 1381 (9th Cir. 1992) (new information warranting change in agency decision should be presented to agency, not presented to court as grounds for reversal of decision). Tribes that have conducted class III gaming for years in full compliance with, and good faith reliance upon, approved compacts, could suddenly find those compacts judicially declared void on the basis of some asserted flaw in the state's assent. The consequences for tribal governmental programs and services and for the financial commitments tribes have made in

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[6] This action was originally filed in the Kansas Supreme Court, but was dismissed on jurisdictional grounds. *Bartelli v. Graves*, No. 96-77237 (Kan.Sup.Ct., Sept. 6, 1996).

reliance on gaming revenues would invariably be – as they are for these Tribes – disastrous.

To permit such critical matters to be determined in the all-or-nothing adversary setting of a court proceeding (particularly one in which the tribes are not even represented, as occurred here) imperils any hope of achieving a reasonable accommodation of the compelling tribal, federal and state interests at stake. Requiring a party who claims that an approved compact is legally flawed to place that claim before the Secretary, in contrast, respects the process crafted by Congress, and gives the best assurance that the legitimate reliance interests of the tribes, which often have no place in the calculus of judicial decisionmaking, will be fairly weighed against the substantiality of the claimed flaw. Where vital governmental interests are arrayed against each other, the flexibility of the administrative process offers a superior mechanism for achieving a satisfactory result. Review of the Court of Appeals' decision by this Court is therefore necessary to restore the primary authority of the Secretary in determining compact validity, and to avoid helter-skelter judicial intrusions into this important area that could wreck the entire scheme crafted by Congress in IGRA.[7]

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[7] Additionally, if the decision below stands, and the Secretary's control over the determination of compact validity is surrendered to courts entertaining every argument that a state's act of concurrence was flawed, there could be significant consequences far beyond the area of tribal-state gaming compacts. Actions taken pursuant to the many federal statutory provisions requiring state concurrence or approval for some federal action may become vulnerable to state second thoughts, or dissident challenges, contrary to this Court's decision in

II. THE COURT OF APPEALS MISCONSTRUED THE GOVERNING FEDERAL STATUTE TO ALLOW COURTS TO ENTERTAIN COLLATERAL ATTACKS ON APPROVED COMPACTS ON GROUNDS NEVER PRESENTED TO THE SECRETARY.

Under the express terms of 25 U.S.C. §2710(d)(3)(B), the tribal-state gaming compacts signed by the Tribes and the State in February, 1995 "took effect" upon their approval by the Secretary of the Interior and the publication of notice in the Federal Register. By parsing the language of the Act in a way that unduly emphasized references to the state and the tribe "entering into" a compact, however, the court below divined a means of direct judicial nullification of these compacts never envisioned or intended by Congress. Along the way, the court disregarded an unbroken line of decisions from this Court and other federal courts requiring that in analogous situations, compacts be accorded considerably greater dignity than were the Tribes' gaming compacts here.

North Dakota v. United States, 460 U.S. 300 (1983) (state's attempt to rescind or condition previously-given consent to federal land acquisition held invalid). Other agreements between tribes and states could come under attack in state or tribal courts on the ground that the tribal or state approval was flawed. Under the decision below, neither secretarial approval of such an agreement (such as, for example, a lease or right-of-way) nor the passage of time would protect such an agreement from challenge.

A. The Statutory Approval Process and Compact Clause Jurisprudence

In the scheme of the IGRA Congress combined two familiar elements from the fields of federal Indian law and federalism – the compact, and oversight by the Secretary of the Interior. At the heart of the scheme is the tribal-state compact, an agreement to be negotiated between two sovereigns as a prerequisite for a tribe to enter into class III gaming. Congress's use of the term "compact," as opposed to "contract" or "agreement," was undoubtedly deliberate. A compact is generally understood as a particular form of agreement, one entered into between sovereign entities.[8] Designating these agreements as compacts, thus, respects the governmental status of each of the parties and the important governmental interests that are brought to bear in the agreement.

More importantly, the use of that term invokes Congress's exclusive constitutional authority under article I, § 10, ¶ 3, to authorize certain types of agreements between and among states, and implicitly, as here, between states and Indian tribes. Where Congress has given express authorization to such a compact, and where the subject matter of that agreement "is an appropriate subject for congressional legislation, the consent of Congress transforms the State's agreement into federal law under the compact clause." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

The subject of Indian gaming is unquestionably within Congress's purview. It is likewise clear that but for

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[8] *See* Black's Law Dictionary (5th ed. 1979) at 255.

the express authorization provided in IGRA, states and tribes could not enter into the kinds of agreements contemplated by IGRA at all, inasmuch as they authorize state regulatory authority and court jurisdiction within Indian country. *Seminole Tribe v. Florida*, 116 S.Ct. 1114, 1124, 1126 (1996). It follows that compacts entered into under IGRA, once approved by the Secretary, become federal law, like interstate compacts under the compact clause. Like interstate compacts, moreover, compacts that have taken effect under IGRA may not be rescinded unilaterally by either party. *Bush v. Muncy*, 659 F.2d 402 (4th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951); *Hinderlider v. La Plata & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

In drafting IGRA Congress recognized that the important state concerns implicated by the sensitive issue of gaming, and the likely inequality in bargaining power between states and tribes, warranted conditioning the effectiveness of a tribal-state compact on its review and approval by a federal official. As it has often done in the field of Indian affairs, Congress conferred upon the Secretary of the Interior this critical role of reviewing and approving each compact to assure compliance with the terms of the Act.

As the United States has urged throughout this litigation, moreover, inherent in the Secretary's power to review and approve compacts is the power to reconsider that approval.[9] This authority to reconsider is an essential

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[9] *Dun & Bradstreet Corp. Found. v. United States Postal Service*, 946 F.2d 189, 193-94 (2d Cir. 1991) ("It is widely accepted

aspect of the Secretary's central role in the compacting process. Giving primacy to that authority assures that no decision potentially affecting the validity of a tribal-state compact under IGRA will be arrived at without careful assessment of the paramount and complex federal interests – including interests arising from the federal-Indian relationship and those stemming from doctrines of federalism – that Congress sought to serve through the Act. The Secretary is moreover in a unique position to give appropriate consideration to the important reliance interests of the tribes, and the effect of compact nullification, factors that a court may not be able to take into account. As this Court observed in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982) (referring to tribal taxing power), the requirement of approval by the Secretary of the Interior "minimize[s] potential concern that Indian tribes will exercise the power . . . in an unfair or unprincipled manner, and ensure[s] that any exercise of the tribal power . . . will be consistent with national policies." So here, preservation of the Secretary's power to decide compact validity assures that the policies of IGRA will be fully and fairly served.

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that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review."); *Albertson v. Federal Communications Comm'n*, 182 F.2d 397, 399 (D.C. Cir. 1950) ("the power to reconsider is inherent in the power to decide . . . in the absence of any specific limitation"); *Civil Aeronautics Board v. Delta Airlines, Inc.*, 367 U.S. 316 (1961).

B. Errors in the Decision Below

The Court of Appeals' conclusion that the courts may disregard and override the Secretary's approval power with respect to these compacts is based upon a contrived analysis of the language of the statute. The court held, essentially, that determining the validity of a compact requires two separate stages of analysis: first, whether the compact has been "validly 'entered into' under applicable state law," and second, whether it has been placed "in effect" by secretarial approval and notice. The question whether a state and a tribe have actually "entered into" a compact, the court held, is determined entirely by state law, as interpreted by a state court, and may be decided even after the compact has taken effect. 104 F.3d at 1553; App. at 16a-17a. This two-step approach – which is essential to the Court of Appeals' result – ignores elemental precepts of federal Indian law that negate its premise, and introduces into the statutory scheme levels of uncertainty that render that scheme unworkable. There is no justification in the language of the statute or in its legislative history for such a tortuous interpretation.

The principal error in the Court's analysis is its assumption that a tribal-state compact is or can be "valid" in any sense apart from the effectiveness given it by secretarial approval. As this Court has noted, the "obvious" lesson of nearly 200 years of decisional law is that "the States . . . have been divested of virtually all authority over Indian commerce and Indian tribes", *Seminole Tribe*, 116 S.Ct. at 1126. IGRA "extends to the States a power withheld from them by the Constitution." *Id.* at 1124. It is meaningless to refer to the "validity" of a

tribal-state compact under state law: there is no pre-existing state authority in the field of Indian gaming, nor any authority on the part of a state to enter into an IGRA-type gaming compact with a tribe. A state's power to enter into such a compact derives wholly from IGRA, and has no other source. That power is moreover subject to whatever conditions and limitations Congress may choose to attach to it. In a very real sense, the tribe and the state have not actually "entered into" a compact until the compact has been approved by the Secretary.

Given the absence of any meaningful pre-existing state law authority governing how a state could validly enter into a tribal-state gaming compact,[10] Congress could not have intended to permit the invalidation of a secretarially approved compact based on a failure to comply with some such state law authority. To do so introduces an inherently unknowable element into the compacting process (and arguably invites states having second thoughts, or hostile state courts, to invent such authority after the fact, as a way of invalidating a compact). Engrafting a separate "entered into" requirement onto the process, as the court below did, makes it impossible to determine with confidence whether any compact can be considered "valid," since the Secretary's approval would necessarily be stripped of any conclusive power. More importantly, tribes would be unable to proceed to make binding commitments in reliance upon a compact's

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[10] To be sure, some state legislatures have, since the enactment of IGRA, passed laws expressly conferring on their governors the authority to negotiate and sign gaming compacts with Indian tribes. *See, e.g.*, A.R.S. §§ 5-601, 5-601.1.

validity, if at any time thereafter a court ruling on the question of the Governor's authority, or the legislature's authority, or some other state law issue, could effectively nullify the compact.

In *Leser v. Garnett*, 258 U.S. 130 (1922), this Court confirmed the decisive effect of the proclamation by the Secretary of State that a constitutional amendment had been ratified by the requisite number of states, and had thus become part of the Constitution of the United States. In that case, challengers claimed that the acts of ratification of the Nineteenth Amendment by two of the states were void under those states' constitutions. In an opinion by Justice Brandeis, this Court responded as follows:

> As the Legislatures of Tennessee and West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts.

258 U.S. at 137. *See also U.S. ex rel. Widenmann v. Colby*, 265 F. 998 (D.C.Cir. 1920), *aff'd*, 257 U.S. 619 (1921).

Leser provided authoritative guidance to several lower courts in rulings that claimed state-law defects in state acts of retrocession of Public Law 280 jurisdiction over Indian country, under 25 U.S.C. § 1323, had no impact on the validity of the retrocession, once the Secretary of the Interior had formally accepted the state acts of retrocession on behalf of the United States and published

notice thereof in the Federal Register.[11] Like the strong federal interest in the conclusiveness of a determination that a constitutional amendment has been adopted, at issue in *Leser*, the federal interest in establishing with certainty the jurisdictional regime in Indian country was found in these cases to outweigh local disputes over how the state had gone about relinquishing its authority. Similarly, the overriding federal interest in compacts serving as a firm basis on which tribes may conduct class III gaming, and thereby strengthen tribal governments, should not become subject to fortuitous judicial challenges uninformed by the complex federal concerns at stake. The intervention of this Court is necessary to affirm the primacy of federal administrative authority over the tribal-state compacting process.

The Court of Appeals' decision leaves every tribe with an approved compact in a hopelessly vulnerable position, and it renders practically toothless the Secretary's authority to determine whether compacts comply with IGRA and, by his approval, to put them into effect. Congress never intended that this legislative scheme, whose purpose was to provide a viable basis upon which tribes could build strong tribal governments and vital economies, would be subject to the whim of creative

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[11] *Omaha Tribe v. Village of Walthill*, 334 F.Supp. 823 (D.Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973); *United States v. Brown*, 334 F.Supp. 536 (D.Neb. 1971); *United States v. Lawrence*, 595 F.2d 1149 (9th Cir.), *cert. denied*, 444 U.S. 858 (1979); *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976), *rev'd on other grounds sub nom. Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

lawyers for opponents of tribal gaming.[12] Rather, the statutory scheme, especially the conclusive role given to the Secretary, dictates that the Secretary's approval not be subject to collateral judicial attack. If the decision below stands, tribes depending on gaming revenues for services and infrastructure for their people will be forever subject to the unending threat of having those revenues cut off at any time by judicial fiat. Such an unwarranted result ravages the congressional scheme, and devastates the legitimate expectations of the tribes.[13]

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[12] Significantly, although Congress expressly provided judicial remedies in federal court in three sets of circumstances arising under IGRA, *see* 25 U.S.C. § 2710(d)(7)(A), no such remedy was specified for a claim that a compact is not valid. Only the Secretary is given authority to make that determination. *Id.* at § 2710(d)(8). *Cf. Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it").

[13] The experience of the New Mexico tribes after the decision below (and this Court's decision in *Seminole*, which precluded any remedy against states that refuse to negotiate) perfectly exemplifies the bind in which tribes now find themselves under IGRA. The Tribes have sought a state legislative resolution of this dispute for the past two years. This year, bowing to overwhelming public support for tribal gaming, the legislature finally did enact a bill authorizing the Governor to sign a form compact, but the terms were simply dictated by the legislature: they were not the product of any negotiations. In addition to imposing drastic restrictions on the Tribes' gaming activities, the form compact would require the Tribes to pay multi-million dollar so-called "regulatory fees" to the State, and to pay the State 16% of their *gross* revenues from gaming machines (less certain minor deductions) as a "revenue sharing" provision. There is serious doubt whether these terms can or will be approved by the Secretary, in light of 25 U.S.C. § 2710(d)(4).

III. CONCLUSION

For the reasons stated, this Court is respectfully urged to grant the writ and to review the opinion and order of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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April 10, 1997

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

PUEBLO OF SANTA ANA, PUEBLO OF SAN JUAN, PUEBLO OF TESUQUE, PUEBLO OF ACOMA, PUEBLO OF SANDIA, PUEBLO OF ISLETA, PUEBLO OF POJOAQUE, SAN FELIPE GAMING ENTERPRISE BOARD, PUEBLO OF TAOS,

Plaintiffs-Counter-Defendants-Appellants,

v.

JOHN J. KELLY, in his official capacity as United States Attorney for the District of New Mexico; JANET RENO, Attorney General of the United States; BRUCE BABBITT, United States Secretary of the Interior; UNITED STATES OF AMERICA,

Defendants-Counter-Claimants-Appellees,

and

STATE OF NEW MEXICO,

Counter-Defendant-Appellee.

No. 96-2162

(Filed Jan. 10, 1997)

GUY CLARK, MAX COLL, GEORGE BUFFETT, STATE OF ALABAMA, STATE OF ARIZONA, STATE OF CALIFORNIA, STATE OF FLORIDA, STATE OF IDAHO, STATE OF MASSACHUSETTS, STATE OF NEVADA, STATE OF RHODE ISLAND, STATE OF HAWAII, STATE OF KANSAS, STATE OF MICHIGAN, STATE OF OKLAHOMA, STATE OF VERMONT, NATIONAL INDIAN GAMING ASSOCIATION, SAN MANUEL BAND OF MISSION INDIANS, SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, and SISSETON WAHPETON SIOUX TRIBE,

Amici Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. NO. CIV-96-0002-MV)

Before **ANDERSON, McWILLIAMS,** and **WEIS***, Circuit Judges.

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* The Honorable Joseph F. Weis, Jr., United States Senior Circuit Judge for the Third Circuit, sitting by designation.

STEPHEN H. ANDERSON, Circuit Judge.

This case presents a central, and dispositive, question: whether, under the Indian Gaming Regulatory Act, the Secretary of the Interior can, by his approval, give life to a compact which was void from its inception because the state governor who signed the compact lacked the authority under state law to sign on behalf of the state. We hold that the Secretary cannot, under the Act, vivify that which was never alive, and we therefore affirm the decision of the district court.

Plaintiffs and appellants Pueblo of Santa Ana, Pueblo of San Juan, Pueblo of Tesuque, Pueblo of Acoma, Pueblo of Sandia, Pueblo of Isleta, Pueblo of Pojoaque, and Pueblo of Taos are federally recognized Indian tribes in New Mexico. Plaintiff and appellant San Felipe Gaming Enterprise Board is a gaming enterprise chartered under the laws of the Pueblo of San Felipe.[1] The Tribes have been operating casinos and other gaming facilities in New Mexico. They brought this action, seeking a declaration of the validity of the Tribal-State gaming compacts they had entered into with the State of New Mexico, under the Indian Gaming Regulatory Act ("IGRA"), after the New Mexico Supreme Court held that the Governor of New Mexico, who had signed the compacts, lacked the authority to do so and at least suggested that New Mexico law did not permit the kind of gambling they were conducting. Defendants John J. Kelly, the United States

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[1] We will hereafter refer to the Pueblo tribes as the "Tribes."

Attorney for New Mexico, Janet Reno, the Attorney General of the United States, Bruce Babbitt, the United States Secretary of the Interior, and the United States of America counterclaimed, seeking a declaration that the Tribes were conducting gambling in violation of federal and state law, and joined the State of New Mexico as a party.[2]

The Tribes and the United States filed cross-motions for summary judgment. The state filed a brief in support of the United States' cross-motion. The district court granted summary judgment to the United States and the State of New Mexico, concluding that the compacts were not valid under IGRA because the Governor lacked the authority under New Mexico law to execute the compacts on behalf of the state. It therefore declared that the Tribes' class III gaming activities violated federal law. The district court granted the Tribes' request for a stay of its judgment, thereby permitting the Tribes' casinos and other gaming facilities to remain open pending this appeal. We affirm.

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[2] There are three other appeals involving identical issues, the outcome of which will be determined by our decision in this case: *Apache Tribe of the Mescalero Reservation v. New Mexico*, No. 96-2156; *Apache Tribe of the Mescalero Reservation v. Reno*, No. 96-2199; and *Jicarillo Apache Tribe v. Kelly*, No. 96-2192. The district courts in those cases reached the same conclusion as the district court here: namely, that the compacts permitting those tribes to conduct class III gaming are invalid.

BACKGROUND

I. *IGRA*

The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA") provides a "comprehensive regulatory framework for gaming activities on Indian lands" which "seeks to balance the interests of tribal governments, the states, and the federal government." *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422, 1425 (10th Cir. 1994), *vacated*, ___ U.S. ___, 116 S. Ct. 1410, 134 L.Ed.2d 537 (1996). It furthers the dual goals of providing "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" as well as ensuring that gaming on Indian lands is shielded from "organized crime and other corrupting influences." 25 U.S.C. § 2702(1), (2). *See* Indian Affairs Comm., Indian Gaming Regulatory Act, S.Rep. No. 100-446, at 1-3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071-73.[3]

IGRA provides for three types of gaming: class I, class II and class III. Only class III gaming, high-stakes casino-style gaming, is at issue in this case. It "includes such things as slot machines, casino games, banking card

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[3] IGRA was enacted in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), in which the Court held that California could not enforce its state and local gaming laws on Indian lands because California regulated, as opposed to completely prohibited, such gaming. Thus, *Cabazon* established a distinction between civil/regulatory laws and criminal/prohibitory laws. States could enforce criminal/prohibitory laws relating to gambling on Indian lands, but not civil/regulatory laws.

games, dog racing, and lotteries." *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S. Ct. 1114, 1119, 134 L.Ed.2d 252 (1996). Class III gaming is permitted if it is "located in a State that permits such gaming for any purpose by any person, organization, or entity" and is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect." 25 U.S.C. § 2710(d)(1)(B), (C). The rationale for the compact system is that "there is no adequate Federal regulatory system in place for Class III gaming, nor do tribes have such systems for the regulation of Class III gaming currently in place," and thus "a logical choice is to make use of existing State regulatory systems" through a negotiated compact. S.Rep. No. 100-446, at 13-14, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083-84. A Tribal-State compact "shall take effect only when notice of approval by the Secretary [of the Interior] of such compact has been published by the Secretary in the Federal Register." 25 U.S.C. § 2710(d)(3)(B). Indian gaming conducted in accordance with the Act's requirements is exempt from federal and state criminal gambling prohibitions.

II. *Indian Gaming in New Mexico*

Since IGRA's passage in 1988, various Indian tribes in New Mexico have sought to enter into class III gaming compacts with the state. Governor Bruce King appointed a task force in 1990 to negotiate gaming compacts with two tribes, the Pueblo of Sandia and the Mescalero Apache tribes. In 1991, after reaching some form of agreement permitting limited class III gaming, the task force presented the compacts to Governor King for signature, but he refused to sign them. The Pueblo of Sandia and the

Mescalero then filed suit against the Governor and the State, seeking to require them to negotiate compacts in good faith, as required at that time by IGRA. *See* § 2710(d)(7).[4] Governor King apparently refused to negotiate with any tribes during the remainder of his term as Governor.

All but two of the Tribes commenced some form of class III gaming without Tribal-State compacts. The Pueblo of Acoma began class III gaming in 1993. Pueblo of Acoma Answers to Defs.' First Set of Interrogs., Appellants' App. Vol. V at A1617. The Pueblo of Isleta began such gaming in 1990, Pueblo of Isleta's Resps. to Defs.' First Set of Interrogs., *id.* at A1621; the Pueblo of Pojoaque began in 1992, Pl.'s Pojoaque Pueblo, Resp. to First Set of Interrogs., *id.* at A1624; the Pueblo of San Juan in 1992, Pl. Pueblo of San Juan's Answers to Defs.' First Set of Interrogs., *id.* at A1630; the Pueblo of Sandia in 1986, Pl. Pueblo of Sandia's Resps. to Defs.' First Set of Interrogs., *id.* at A1633; the Pueblo of Santa Ana in 1993, Pl. Pueblo of Santa Ana's Resps. to Defs.' First Set of Interrogs., *id.* at A1644; and the Pueblo of Tesuque in 1992, Tesuque Pueblo's Resp. to Defs.' First Set of Interrogs., *id.* at A1657-58. The Pueblo of San Felipe and the Pueblo of Taos began class III gaming after they entered into compacts. Resp. to Defs.' First Set of Interrogs. to Pl. Pueblo of San Felipe Gaming Enter. Bd., *id.* at A1627; Pl. Pueblo

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[4] Our court reversed the district court's dismissal of those suits on sovereign immunity grounds. *Ponca Tribe*, 37 F.3d 1422 (10th Cir. 1994) (holding that neither the Tenth nor the Eleventh Amendments barred the tribes' suits against the states). The Supreme Court's decision in *Seminole Tribe*, ___ U.S. ___, 116 S. Ct. 1114, 134 L.Ed.2d 252, overruled our decision in *Ponca Tribe*.

of Taos's Resps. to Defs.' First Set of Interrogs., *id.* at A1649-52. In May 1994, defendant John Kelly, the U.S. Attorney, entered into non-prosecution agreements with the Tribes who had already commenced gaming activities, agreeing not to take any enforcement action provided the Tribes limit their gaming activities.

Indian gaming became a significant campaign issue in the 1994 gubernatorial campaign. Governor King was defeated for reelection by Gary Johnson, who had publicly committed to signing Tribal-State compacts if elected Governor. At that same election, voters approved a constitutional amendment authorizing a state lottery and legalizing video gambling.[5]

Governor Johnson appointed Professor Fred Ragsdale to negotiate compacts with various Indian tribes, and on February 13, 1995, he signed thirteen identical compacts. The Secretary of the Interior approved twelve of the compacts on March 15, 1995, and published notice of such approval in the Federal Register on March 22. The thirteenth compact, between the Pueblo of Acoma and the State, was approved by the Secretary on April 24, and notice was published in the Federal Register on May 15. Defendant Kelly sent to the tribes letters dated March 21, stating in pertinent part:

> The execution, approval and publication of your tribe's compact should bring it into compliance with applicable federal law. In any event, the

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[5] The New Mexico Supreme Court subsequently concluded that the amendment was unconstitutional because it improperly conjoined two separate issues in one amendment. *State ex rel. Clark v. State Canvassing Bd.*, 119 N.M. 12, 888 P.2d 458 (1995).

> approval of the compacts constitutes a change in circumstances warranting termination of the non-prosecution letter.
>
> . . . [T]he letter of non-prosecution shall afford the tribe no protection with respect to conduct occurring after the date of termination.

Montoya Aff. Ex. RM-15, Appellants' App. Vol. II at A279; Vigil Aff. Ex. 1, *id.* at A325. On July 1, 1995, the New Mexico Lottery Act became effective, creating a state-run lottery. N.M. Stat. Ann. §§ 6-24-1 to -34.

The Tribes have spent varying amounts of money constructing new or improved gaming facilities, and have implemented various tribal programs with existing gaming revenues or in anticipation of such revenues.[6] The

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[6] For example, the Pueblo of Santa Ana spent $1,265,275.00 to expand their existing gaming facility, along with $2,786,950.00 for furnishings and equipment for the expanded facility. Montoya Aff. at ¶ 19, Appellants' App. Vol. II at A262-63. Joseph V. Sanchez, Chairman of the San Felipe Pueblo Gaming Enterprise Board and previous Governor of the San Felipe Pueblo, stated that the San Felipe Gaming Enterprise incurred $17,266,869 in debt for the construction and expansion of a gaming facility, of which "$16,723,869 was borrowed in reliance on the tribal-state compact." Sanchez Aff. ¶¶ 19-20, *id.* at A287. The Pueblo of Tesuque committed approximately $4.1 million "to construction and equipment after Governor Johnson's inauguration and the approval of the Compact." Vigil Aff. ¶ 9, *id.* at A319-20. The Pueblo of Isleta spent over $20 million in connection with the construction of a resort/gaming/hotel complex. Lucero Aff. ¶ 4, *id.* at A349-50. The Pueblo of Pojoaque borrowed or spent over $15 million dollars to renovate and expand gaming and horse-racing facilities. Viarrial Aff. ¶¶ 5-8, *id.* at A356-57. The Pueblo of Acoma borrowed $3.5 million to purchase class III gaming equipment and casino

economic impact of gaming on the lives of Tribe members is significant, and gaming revenues are a major source of income for the Tribes.

III. *New Mexico Supreme Court Decisions*

The status of Indian gaming in New Mexico was considerably impacted by two decisions of the New Mexico Supreme Court.

A. *State ex. rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995)

On July 13, 1995, the New Mexico Supreme Court ruled that Governor Johnson lacked the authority to sign the compacts on behalf of the state. *State ex. rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11, 24 (1995). The Supreme Court also held that "the compact[s] and agreement[s] authorize[ ] more forms of gaming than New Mexico law permits under any set of circumstances." *Id.*, 904 P.2d at 21. The court reached its conclusion about the Governor's authority by examining both the state constitution and any relevant state statutory authority. It held that neither source conferred upon Governor Johnson the authority to enter into the compacts.

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furnishings. Shutiva Aff. ¶ 4, *id.* at A361. The Pueblo of San Juan "invested approximately $2 million in buildings, furniture, fixtures, and equipment . . . and has entered into various contracts exceeding $5 million for goods, services, and gaming devices for the operation of Class III gaming under the Compact." Garcia Aff. ¶ 2, *id.* at A364.

With respect to the New Mexico constitution and the doctrine of separation of powers, the court held that the constitution "mandates that it is the Legislature that creates the law, and the Governor's proper role is the execution of the laws." *Id.* at 22. Thus, "[i]f the entry into the compacts reasonably can be viewed as the execution of law, we would have no difficulty recognizing the attempt as within the Governor's authority as the State's chief executive officer." *Id.* However, if entry into the compacts "in fact conflict[s] with or infringe[s] upon what is the essence of legislative authority – the making of law," the Governor exceeded his authority. *Id.*

In examining the effect of the Governor's entry into the compacts, the court concluded that the compacts "preclude future legislative action" and "foreclose[ ] inconsistent legislative action" because they "give the Tribe[s] a virtually irrevocable and seemingly perpetual right to conduct any form of Class III gaming permitted in New Mexico on the date the Governor signed the agreement." *Id.* at 23. Furthermore, the court concluded that the Governor's entry into the compacts disrupted legislative authority "because the compact strikes a detailed and specific balance between the respective roles of the State and the Tribe in such important matters as the regulation of Class III gaming activities, the licensing of its operators, and the respective civil and criminal jurisdictions of the State and the Tribe necessary for the enforcement of state or tribal laws or regulations." *Id.* The New Mexico Supreme Court also held that, by entering into compacts which authorized the Tribes to engage in

"all forms of casino-style games," the Governor "contravened the legislature's expressed aversion to commercial gambling." *Id.* at 24.

The court found further support for its conclusion by observing that, historically, every other compact entered into between New Mexico and other sovereign entities was accomplished through legislative enactment, which the Governor simply approved or vetoed. The court concluded these gaming compacts with Indian tribes should be handled the same way.

The New Mexico court then considered whether any statutory authority supported the Governor's unilateral entry into the gaming compacts, and concluded that neither the Joint Powers Agreements Act, N.M. Stat. Ann. §§ 11-1-1 to -7, nor the Mutual Aid Act, N.M. Stat. Ann. §§ 29-8-1 to -3 authorized the compacts.[7]

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[7] The Joint Powers Agreement Act authorizes "public agencies" to enter into "agreements" with other public agencies. The statute defines "public agency" to include "this state, an adjoining state or any state department or agency, [or] an Indian tribe or pueblo." N.M. Stat. Ann. § 11-1-2(A). Such public agencies are only authorized to enter into agreements "[i]f authorized by their legislative or other governing bodies." § 11-1-3. The New Mexico Supreme Court held that "[t]his language plainly mandates that the legislature must approve any agreement to which the State is a party." *Clark*, 904 P.2d at 25.

The Mutual Aid Act permits any public agency, defined as including "the federal government or any department or agency thereof, an Indian tribal council, Indian pueblo council and the state or any county or municipality thereof," N.M. Stat. Ann. § 29-8-2, to enter into a "mutual aid agreement[ ]" with any other public agency "with respect to law enforcement, provided

B. *Citation Bingo, Ltd. v. Otten*, 910 P.2d 281 (N.M. 1995)

The second New Mexico Supreme Court decision relevant to this case was *Citation Bingo, Ltd. v. Otten*, 121 N.M. 205, 910 P.2d 281 (1995), decided in November 1995. The specific issue before the court was "whether a hand-held electronic device known as 'Power Bingo' is a permissible piece of gaming equipment under the Bingo and Raffle Act." *Id.* 910 P.2d at 281. In the course of its decision, however, the court made a number of general statements about New Mexico's gambling laws and policies. It began by observing that it would "narrowly construe the terms of the [Bingo and Raffle] Act" because such a construction was "consistent with this state's policy against gambling." *Id.* at 282. It further noted that "[w]ith limited exceptions, gambling is a crime in New Mexico." *Id.* at 283. More significantly, the court stated as follows:

> We take judicial notice of recent newspaper references to 'the Las Vegas-night law' applicable to charities. While the record before this Court does not reveal whether gambling devices traditionally found in casinos have in fact been used in this state for gratuitous amusement or even to make bets, we find no statutory authorization

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any such agreement shall be approved by the agency involved and the governor." § 29-8-3. The New Mexico Supreme Court held that while the gaming compacts included some provisions relating to law enforcement, not all of the compact provisions related to law enforcement. Thus, it concluded that the Mutual Aid Act did not provide the requisite authority for the compacts. *Clark*, 904 P.2d at 25-26.

> for any 'Las Vegas-night' gambling in New Mexico. We are cited to no authoritative use of the term 'lottery' to include casino-style gaming.

Id. at 283-84 n.2. The court also stated that "video, electromechanical, and computer forms of specifically authorized games are against public policy." *Id.* at 287.

DISCUSSION

We review de novo the grant of summary judgment, applying the same legal standard as did the district court. *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1510 (10th Cir. 1996); *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995). We examine the factual record and draw all inferences in favor of the party against whom judgment is granted. *Orange v. District of Columbia*, 59 F.3d 1267, 1270 (D.C. Cir. 1995). Under Rule 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1173 (10th Cir. 1996).

The Tribes argue that the compacts are valid and in effect, and that the district court erred in determining that the compacts were void because the Governor lacked the authority to sign them on behalf of the state. The United States argues that the compacts are in effect under IGRA, but asserts that the class III gaming conducted by the Tribes violates federal law, and is not conducted in compliance with IGRA, because New Mexico prohibits

such gaming "for any purpose by any person."[8] It thus urges us to affirm the district court's grant of summary judgment on this alternative ground. The State, as counter-defendant, argues that the district court correctly held that the compacts are void because invalid under state law, and it joins the United States in its argument that the Tribes' gaming activities are illegal under state law.

Amicus briefs have been filed by: (1) the States of Alabama, Arizona, California, Florida, Hawaii, Idaho, Kansas, Massachusetts, Michigan, Nevada, Oklahoma, Rhode Island, and Vermont in support of the State of New Mexico; (2) Max Coll and George Buffett, citizens of New Mexico and legislators currently serving in the New Mexico House of Representatives, and Guy Clark, a citizen of New Mexico who opposes the spread of gambling, in support of the State and requesting that we immediately lift the stay; and (3) the National Indian Gaming Association, the San Manual Band of Mission Indians, the Shakopee Mdewakanton Sioux Community, and the Sisseton Wahpeton Sioux Tribe, in support of the Tribes.

As we have indicated, in order for class III gaming to be exempt from the application of federal and state criminal prohibitions, it must meet three conditions: (1) there must be an approved tribal ordinance authorizing the class III gaming, 25 U.S.C. § 2710(d)(1)(A); (2) the gaming must be "located in a State that permits such gaming for any purpose by any person, organization, or entity," § 2710(d)(1)(B); and (3) there must be a compact "entered

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[8] The United States argues that the Tribes' gaming violates the Johnson Act, 15 U.S.C. § 1175, the Organized Crime Control Act, 18 U.S.C. § 1955, and IGRA, 18 U.S.C. § 1166.

into" by the tribe and the state which is "in effect." § 2710(d)(1)(C). A compact "takes effect" when it is approved by the Secretary of the Interior and notice of it is published in the Federal Register. § 2710(d)(3)(B). Failure to comply with any one of the three conditions means the class III gaming is subject to applicable criminal statutes.

The district court held that the compacts in question failed to meet the second condition, in that the Governor's lack of authority to bind the state rendered the compact void, and the subsequent approval of the compacts and publication of notice in the Federal Register did nothing to give life to the void compacts. It reached this conclusion by examining IGRA and conducting its own independent review of state law. It thus did not reach the issue of whether the other two conditions were met.

I. *Validity of Compacts*

The district court held that the "entered into" and the "in effect" components of 25 U.S.C. § 2710(d)(1)(C) are essentially two separate requirements: (1) the compacts must be validly "entered into" under applicable state law *and* (2) they must be "in effect" pursuant to Secretarial approval and notice. The Tribes and the United States argue approval by the Secretary is all that is required to make the compacts valid and in effect, regardless of whether the compacts were valid under state law.[9] The

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[9] It appears that the Pueblo of Acoma argues that, in fact, the Governor did have authority to enter into the compacts. The other Tribes appear to argue that, in any event, the Secretary's

State agrees with the district court that validity of the compacts under state law is an essential and separate requirement under IGRA.

We hold that: (1) IGRA imposes two separate requirements – the State and the Tribe must have "entered into" a compact *and* the compact must be "in effect" pursuant to Secretarial approval – before class III gaming is authorized; (2) state law determines the procedures by which a state may validly enter into a compact; and (3) in determining whether the State and the Tribes have entered into compacts, valid and binding under New Mexico law, we agree with and follow the New Mexico Supreme Court's decision in *Clark*.

A. *"Entered into" and "in effect" requirements*

" 'In determining the scope of a statute, we look first to its language.' " *United States v. Silvers*, 84 F.3d 1317, 1321 (10th Cir. 1996) (quoting *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981)). Thus, like the district court did, we first examine IGRA's language to determine whether the "entered into" and the "in effect" requirements are separate or whether, as the Tribes urge us, Secretarial approval of the compacts, placing the compact into effect under IGRA, is all that is necessary.

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approval cured any problem with the Governor's execution of the compacts.

Section 2710(d)(1)(C) of IGRA permits class III gaming "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect." The statute also states as follows:

> The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that –
>
> (A) is entered into under paragraph (3) by a State in which gambling devices are legal, and
>
> (B) is in effect.

§ 2710(d)(6). Both provisions separate the "entered into" requirement from the "in effect" requirement, the latter provision more clearly than the former. IGRA unambiguously provides that a compact goes into "effect" when it is approved by the Secretary and notice is published in the Federal Register. § 2710(d)(3)(B). It does not define what is necessary for a tribe and state to "enter[ ] into" a compact, nor does it state which branch of state government can or must sign a compact.[10] Thus, the language of the statute suggests that the "in effect" requirement establishes the date when the compact becomes effective under IGRA, but arguably says nothing about whether a state has validly entered into a compact.

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[10] IGRA does refer throughout only to the "State" as the party which can enter into a Tribal-State compact. *See also Ponca Tribe*, 37 F.3d at 1437 (noting that "the state is the only party that may enter into a compact with an Indian tribe").

The legislative history of IGRA provides some guidance. The Tribes argue the district court "badly misinterpreted Congress's intentions with respect to state involvement in tribal Class III gaming." Appellants' Br. in Chief at 31. They argue that the legislative history shows that the overriding purpose of IGRA was to promote tribal self-sufficiency, and that Congress was "extremely reluctant to open the door to state involvement in the regulation of gaming on Indian lands." *Id.* As a result, so the argument goes, a compact which was invalid under state law could nonetheless bind the state under IGRA, so long as it receives Secretarial approval.

We do not agree that Congress expressed little concern for state interests when it enacted IGRA. Indeed, the legislative history of the Act is replete with references to the need to accommodate tribal *and* state interests:

> This legislation is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives, while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied.

S. Rep. No. 100-446, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076. The Senate Report described the tribal-state compacts as follows:

> [T]he Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the *interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises* such as parimutuel horse and dog racing, casino gaming, jai alai

> and so forth. The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply. The Committee balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The Committee concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns. . . .
>
> In the Committee's view, *both State and tribal governments have significant governmental interests in the conduct of class III gaming*. . . . A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens.

Id. at 13, *reprinted in* 1988 U.S.C.C.A.N. at 3083 (emphasis added).

While preservation of tribal sovereignty was clearly of great concern to Congress, respect for state interests relating to class III gaming was also of great concern. We are hesitant to conclude that Congress intended to permit a state to be bound by a compact regulating class III gaming which it never validly entered. *Cf. Seminole Tribe*, 116 S. Ct. at 1119 (observing that IGRA "provides that an Indian tribe may conduct certain gaming activities only in conformance with a *valid* compact between the tribe and the State") (emphasis added); *see also Kickapoo Tribe of*

Indians v. Babbitt, 43 F.3d 1491, 1495 (D.C. Cir. 1995) ("Clearly, . . . the State of Kansas has an interest in the validity of a compact to which it is a party. . . . ").

Several district courts have considered the effect, if any, of a subsequent determination that the particular state representative who entered into the compact in fact lacked the authority to do so. Two of the three courts have reached the same conclusion as the three district courts in New Mexico – that a compact entered into by someone without authority to bind the state is void and without effect, regardless of the Secretary's approval of the compact. Thus, they have implicitly concluded that validity of a compact under state law is a separate requirement from Secretarial approval. *See Narragansett Indian Tribe of Rhode Island v. Rhode Island*, Nos. 94-0618-T, 94-0619-T, 95-0034-T, 1996 WL 97856, at *2 (D.R.I. Feb. 13, 1996) (holding that a compact signed by the Governor, who lacked authority under state law to sign the compact, "is void in the same sense that any document executed without proper authority is void; namely, it has no legal effect"); *Kickapoo Tribe of Indians v. Babbitt*, 827 F. Supp. 37, 46 (D.D.C. 1993) ("[B]ecause only the Governor – a person without authority – signed the compact, the State did not enter into the compact. Thus, the compact does not comply with § 2710(d)(8)(A) and is invalid."), *vacated on other grounds*, 43 F.3d 1491 (D.C. Cir. 1995); *cf. Willis v. Fordice*, 850 F. Supp. 523, 532-33 (S.D. Miss. 1994) (finding, in response to challenge to Governor's authority to enter into a compact, that the Governor in fact had the authority under state law to enter into compact), *aff'd*, 55

F.3d 633 (5th Cir. 1995).[11] *But see, Langley v. Edwards*, 872 F. Supp. 1531, 1535 (W.D. La. 1995) ("Compact approval by the Secretary cannot be invalidated on the basis of a governor's *ultra vires* action, because a contrary rule would compel the Secretary to consider state law before approving any compact."), *aff'd*, 77 F.3d 479 (5th Cir. 1996). We therefore conclude that the "entered into" language imposes an independent requirement and the compact must be validly entered into by a state before it can go into effect, via Secretarial approval, under IGRA.[12] The

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[11] In *Willis*, the Secretary had approved the compact and notice had been published in the Federal Register. Thus, IGRA's "in effect" provision had been satisfied. The court nonetheless examined whether the Governor had the authority under state law to sign the compact. It is difficult to see why the court would examine that question unless it believed that it was a separate requirement from Secretarial approval.

[12] The Tribes rely on several cases involving state retrocession of jurisdiction over Indian reservations in support of their argument that the Secretary's approval of the compacts conclusively establishes their validity. *See United States v. Lawrence*, 595 F.2d 1149 (9th Cir. 1979); *Omaha Tribe v. Village of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972); *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971).

The retrocession cases involved Congressional legislation, enacted in 1953, permitting the transfer to states of jurisdiction over criminal and civil actions committed or arising in Indian country located within a state's borders. Its purpose was to encourage Indians to become "first class citizen[s]," on the theory that "subjecting the Indian to equality of the responsibilities of state law would make him equal in all respects to other citizens of the state." *Brown*, 334 F. Supp. at 538. Observing that it had failed to accomplish its objective, Congress in 1968 partially repealed the legislation, and, *inter alia*, authorized the United States to accept a retrocession from any state of all or any jurisdiction acquired earlier by the state.

Tribes make a number of arguments against this conclusion, and we address each in turn.

1. *Non-compact class III gaming under IGRA*

The Tribes argue that the fact that IGRA contemplates tribes conducting class III gaming even without a compact, if the State refuses to negotiate one or to accept one proposed by a mediator, supports its argument that a valid compact is unnecessary. The district court drew precisely the opposite conclusion from those provisions in IGRA, 25 U.S.C. § 2710(d)(7)(B)(vii), and we agree with the district court's interpretation.

As the legislative history makes clear, Congress was concerned about striking a balance between the interests of tribes and of states in class III gaming. Thus, the Act

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Several states retroceded to the United States jurisdiction over Indian lands within their borders, and the Secretary of the Interior accepted the retrocession, only to have a subsequent challenge to the validity of the state's act of retrocession. The courts held that the Secretary's acceptance of the retrocession conclusively established the validity of the retrocession.

The district court distinguished those cases from the situation here, holding that state retrocession "is a one-time event between the state and the United States;" that the policy behind the retrocession statute strongly favored federal jurisdiction; that gaming compacts are ongoing agreements imposing affirmative duties on the states; and that the policy of finality, important to the retrocession statute, is less important to IGRA. *Pueblo of Santa Ana*, 932 F.Supp. at 1295-97.

We agree with the district court that the retrocession cases involve different considerations from this case, and do not control this case.

gives states multiple chances to negotiate a compact governing the conduct of such gaming. As the district court observed, it is "[o]nly after rejecting several opportunities to involve itself in the negotiation process [that] the Act terminate[s] the State's opportunity to participate." *Pueblo of Santa Ana v. Kelly*, 932 F.Supp. 1284, 1293 (D.N.M.1996). Congress could have permitted Indian tribes to conduct any kind of gaming on Indian lands without any involvement by states. The fact that it provided states with several opportunities to become involved through the compacting process suggests Congressional concern to permit state involvement if a state so desires. The fact that it permits such gaming, if the other requirements of IGRA are met, when a state affirmatively refuses to negotiate a compact in no way minimizes the importance of the compact process. Similarly, to permit a state actor to purport to bind the state when in fact he or she lacks the authority to do so undermines the significance of the compact process as a means of providing meaningful state involvement if a state so desires.

2. *Finality*

The Tribes also argue that the district court's decision undermines finality and forever subjects a compact to collateral attack on state law grounds. The United States makes a related argument that the only way to challenge an approved compact is to ask the Secretary to withdraw his approval, and to challenge his decision not to withdraw approval under the Administrative Procedure Act, 5 U.S.C. §§ 701-06. We are not persuaded that the possibility of indefinite collateral attack is as real, or as dire, as

the Tribes claim it is. We need not reach the argument made by the United States because we have held that, under IGRA, the existence of a valid compact is a requirement for conducting class III gaming.

A compact is a form of contract. *Texas v. New Mexico*, 482 U.S. 124, 128, 107 S.Ct. 2279, 2283, 96 L.Ed.2d 105 (1987) (" '[a] Compact is, after all, a contract' ") (quoting *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 285, 79 S.Ct. 785, 792, 3 L.Ed.2d 804 (1959) (Frankfurter, J., dissenting)). As with any contract, parties entering into one must assure themselves that each contracting party is authorized to enter into the contract. There are familiar, and well-established, methods for obtaining such assurance. In this case, as in the others in which the Governor's authority to sign a compact has been questioned, the challenge came promptly and was quickly resolved. Indeed, Governor Johnson signed the compacts in February 1995, they were approved by the Secretary and published in the Federal Register in March 1995, a petition challenging the Governor's authority to sign the compacts was filed in April, and in mid-July of that year (approximately 120 days following the Secretary's approval) the New Mexico Supreme Court unanimously declared that the Governor had lacked the authority to sign them. *See also Narragansett Indian Tribe*, 1996 WL 97856 at *1 (court certified question of Governor's authority to sign compact within five months of signing of compact); *Langley*, 872 F.Supp. at 1532 (court ruled on challenge to Governor's authority within three months of signing of compact); *Kickapoo Tribe*, 827 F.Supp. at 39 (Attorney General filed suit seeking determination of Governor's power to sign compact within three weeks of

signing it); *cf. Willis*, 850 F.Supp. at 524-25 (plaintiff filed action in state court within ten months, and action in federal court within thirteen months of signing of compacts). In practice, it appears that challenges are made quickly, and resolved promptly.

Moreover, while we appreciate the enormous costs, both economic and human, which the Tribes will incur if they must now close gaming facilities they currently operate under these compacts, the Tribes must bear some responsibility for their dilemma, because, as they conceded at oral argument, most of them commenced gaming well before these compacts were signed.[13] In the face of the Tribes' admittedly precipitous conduct, their claimed need for finality now seems less tenable.

3. *Secretarial inquiry into state law*

The Tribes further argue that our interpretation places "the Secretary in an untenable position, requiring that he determine with certainty whether or not a compact presented for approval is fully 'valid' . . . that is, executed by a state official with actual state law authority." Appellants' Br. in Chief at 20. We do not agree. IGRA

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[13] There has been a great deal of argument about whether, or to what degree, the Tribes were aware of possible problems with the Governor's authority to sign the compacts. The record contains some evidence that the issue was raised, with the Tribes and their counsel, prior to the signing of the compacts. *See, e.g.*, Tackett Aff. ¶ 7, Appellants' App. Vol. IV at A1296; *see also* Appellants' App. Vol. IV at A1300, A1309, A1311; Gover Dep. at 21-22, *id.* at A1161, Appellants' App. Vol. V at A1496; Yohalem Dep. at 27-28, 57-72, *id.* at A1541, A1543-45.

makes it clear that the Secretary must approve a compact within 45 days. 25 U.S.C. § 2710(d)(8)(C). We agree with the Tribes that Congress did not intend to force the Secretary to make extensive inquiry into state law to determine whether the person or entity signing the compact for the state in fact had the authority to do so. However, that does not mean that consequences should not flow, such as a determination that the compact is invalid, if it turns out that the state has not validly bound itself to the compact. Indeed, as Secretary Babbitt said in a letter to Senator Jeff Bingaman of New Mexico, concerning the compacts at issue in this case:

> We agree that compacts between Indian tribes and states are valid only if entered into by the appropriate State officials. However, given IGRA's 45-day time constraint and the automatic approval provision, we do not believe that Congress contemplated that the Department would address or resolve complex issues of State law raised by an internal challenge to a Governor's authority. In this regard, we must defer to the representations of Governors, as the Chief Executive Officers of their states, unless it is clear beyond cavil that a Governor lacks the authority to sign a compact.

Ex. 120, Appellants' App. Vol. IV at A1271. As the Secretary observes, a compact is not *valid* unless properly authorized, but the Secretary is not expected to *resolve* state law issues regarding that authority in the 45-day period given to him to approve a compact.

4. *Governor's action merely voidable*

The Tribes also assert that the Governor's act of signing the compacts without authority was merely a voidable act, which the Secretary in essence "cured" by approving the compacts. The cases the Tribes cite as support for this argument are, however, factually distinguishable, in that they involve an unauthorized act which was subsequently ratified or approved by the body with clear authority to ratify or approve the action. *See, e.g., National Civil Serv. League v. City of Santa Fe*, 370 F.Supp. 1128, 1132 (D.N.M.1973) (if City Manager lacked authority to enter into contract, City Council subsequently ratified the contract). They do not support the argument that a federal official can ratify or authorize an unauthorized state actor's conduct.

In sum, the Tribes' arguments do not convince us that Secretarial approval of the compacts is all that is necessary in order for the compacts to comply with IGRA.

B. *State law governs validity of compact*

Another, but very closely related, issue about which the parties disagree is whether federal law or state law, or both, govern the validity of a compact. We agree with the courts in *Willis*, 850 F.Supp. at 532, and *Kickapoo Tribe*, 827 F.Supp. at 45-46 that determining the validity of a compact necessitates an interpretation of both federal and state law.

IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court. Thus, we indisputably have the *power* to

determine whether a Tribal-State compact is valid. *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28, 71 S.Ct. 557, 560, 95 L.Ed. 713 (1951) ("Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts."). However, that does not mean that state law plays no role at all in the statute.

As we have held, IGRA imposes two requirements for a compact to authorize class III gaming – the compact must be validly entered into by the state and the tribe, and it must be in effect pursuant to Secretarial approval. The plain language of IGRA makes it clear that Secretarial approval and publication places a compact "into effect." However, IGRA says nothing specific about how we determine whether a state and tribe have entered into a valid compact. State law must determine whether a state has validly bound itself to a compact. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 493 & n. 39, 99 S.Ct. 740, 757 & n. 39, 58 L.Ed.2d 740 (1979) (holding that section 6 of Pub. L. 280 (now codified at 25 U.S.C. § 1324), authorizing "the people of any State to amend, where necessary, their State constitution or existing statutes" to effect the transfer of civil and criminal jurisdiction over Indian lands to the state, required the application of state law to the procedural amendment requirement).[14] We agree with the

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[14] The Tribes attempt to distinguish *Yakima* by arguing that Pub. L. 280 provided for "no federal approval, certification or ratification" of state action assuming jurisdiction, but it provided general procedural requirements for such state action, and left the specifics of those requirements up to state law. Appellants' Reply Br. at 13. They argue that IGRA, by contrast,

district court that IGRA's very silence on this point supports the view that "Congress intended that state law determine the procedure for executing valid gaming compacts." *Pueblo of Santa Ana*, 932 F.Supp. at 1294. Thus, the state and Tribe must be validly bound under state law.

C. *Who decides state law issue*

A final related question is whether we must independently decide whether the state validly bound itself under state law, or whether we must follow the New Mexico Supreme Court's determination of that issue in *Clark*, or whether we need only give some deference to the state court's determination. The district court held that, under *Sims*, it must independently review state law and determine whether the state was validly bound. It reached the identical conclusion as the New Mexico Supreme Court – i.e., that the Governor lacked the authority to sign the compact.

The Tribes conceded at oral argument of this case that *Clark* did indeed hold that the Governor lacked the authority to enter into the compacts. They also conceded that we are required, absent extraordinary circumstances,

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involves only a federal act, the Secretary's approval of the compact, to put into effect the compact, and that it is that federal act alone which satisfies IGRA's procedural requirements. This ignores that fact that IGRA contemplates two steps – the tribe and state "enter into" a compact, and the compact goes "into effect" when approved by the Secretary. The requirement that a state "enter into" a compact is, in our view, analogous to the procedural requirements set forth in Pub. L. 280.

to accept that determination.[15] They simply argue it is irrelevant under IGRA, because Secretarial approval is all that is necessary to make the compacts valid and binding. The State similarly argues we are bound by the *Clark* decision. The question remains whether, despite these concessions, we nonetheless are required by *Sims*, 341 U.S. 22, 71 S.Ct. 557, 95 L.Ed. 713 (1951), to independently examine state law, albeit giving deference to the New Mexico Supreme Court's decision, or whether we simply accept that decision as the authoritative declaration of state law.

In *Sims*, West Virginia and seven other states had entered into a compact to control water pollution by means of a commission with representatives from each of the states. West Virginia's legislature approved the compact, and attempted to appropriate funds as part of the state's contribution to the expenses of the commission. When the state auditor refused to pay the appropriation, the West Virginia members of the commission, along with others, brought an action in the West Virginia Supreme Court of Appeals, which held that the legislative act approving the compact was invalid because it violated West Virginia's constitution. The Supreme Court, after

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[15] Amicus National Indian Gaming Association and the tribes which have joined it as amici argue that the *Clark* decision represented new law which cannot be applied retroactively. The Tribes do not assert this argument, nor was it argued below, and we therefore decline to address it. *See Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441, 112 S.Ct. 1407, 1414-15, 118 L.Ed.2d 73 (1992); *Knetsch v. United States*, 364 U.S. 361, 370, 81 S. Ct. 132, 137, 5 L.Ed.2d 128 (1960); *United States v. Singleton*, 16 F.3d 1419, 1429 n. 48 (5th Cir. 1994).

independently reviewing West Virginia's law, reversed the state court, concluding that nothing in the compact offended the state constitution. The Court did observe, however, that "[o]f course every deference will be shown to what the highest court of a State deems to be the law and policy of its State." *Id.* at 28, 71 S.Ct. at 560.

In our view, arguments exist supporting either reading of *Sims* – that *Sims* requires us to independently examine state law, giving deference to the state court's determination, or that *Sims* requires us, in this particular case, to accept as binding the state court's determination. We need not explore that issue further, however, as a resolution of the matter would not change the outcome of this case. Whether we give deference to the New Mexico Supreme Court's thorough and careful analysis of state law, or whether we view ourselves as bound by it, we accept as determinative in this case the state court's decision on the question of whether the Governor of New Mexico had the authority, under the New Mexico constitution or statutory law, to bind the state to the compacts. That court unambiguously held that the Governor lacked the authority to bind the state to the compacts. We agree with that decision. The compacts were therefore never validly "entered into" by the state and, as a result, do not comply with IGRA.

II. *Other IGRA Requirements*

Because we have held that the compacts do not comply with IGRA because the state never validly entered

into them, we need not address IGRA's other requirements, in particular whether, or to what extent, class III gaming is permitted in New Mexico.

CONCLUSION

For the foregoing reasons, the decision of the district court declaring that the compacts pursuant to which the Tribes conduct class III gaming in New Mexico are invalid is AFFIRMED. In so holding, we are acutely aware that while we have reached a decision in this case, as we must, we have by no means solved an extremely difficult and sensitive problem facing tribe members, citizens, and legislators in New Mexico. The only hope for a satisfactory solution is through dialogue and good faith negotiation between all involved parties. We hereby stay the mandate in this case, pending final resolution of this matter, either in this court or the United States Supreme Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF SANTA ANA, et al.,

Plaintiffs,

vs. CIV NO. 96-0002 MV/DJS

JOHN KELLY, et al.,

Defendants.

FINAL ORDER

(Filed Jul. 12, 1996)

THIS MATTER came on for consideration of cross motions for summary judgment. A memorandum opinion was entered this date.

Wherefore.

IT IS HEREBY ORDERED that Defendants' Cross Motion for Summary Judgment, filed May 13, 1996 **[Doc. No. 133]** is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment as to all of Plaintiffs' Claims and as to Defendants' First and Third Counterclaims, filed April 15, 1996 **[Doc. No. 97]**, Plaintiffs' Supplemental Motion for Summary Judgment with Respect to Defendants' Second Counterclaim, filed April 15, 1996 **[Doc. No. 101]** are **DENIED.**

/s/ Martha Vazquez
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF SANTA ANA, PUEBLO OF SAN JUAN, PUEBLO OF TESUQUE, PUEBLO OF ACOMA, PUEBLO OF SANDIA, PUEBLO OF ISLETA, PUEBLO OF POJOAQUE, SAN FELIPE GAMING ENTERPRISE BOARD, and PUEBLO OF TAOS,

Plaintiffs,

vs.

JOHN J. KELLY, in his official capacity as United States Attorney for the District of New Mexico; JANET RENO, Attorney General of the United States; BRUCE BABBITT, United States Secretary of the Interior; and the UNITED STATES OF AMERICA,

Defendants,

and

UNITED STATES OF AMERICA,

Counterclaimant,

vs.

PUEBLO OF SANTA ANA, PUEBLO OF SAN JUAN, PUEBLO OF TESUQUE, PUEBLO OF ACOMA, PUEBLO OF SANDIA, PUEBLO OF ISLETA, PUEBLO OF POJOAQUE, SAN FELIPE GAMING ENTERPRISE BOARD, and PUEBLO OF TAOS,

and

STATE OF NEW MEXICO,

Counterdefendants.

CIV 96-0002
MV/WWD

(Filed
Jul. 12, 1996)

OPINION

THIS MATTER came before the Court on Plaintiffs' Motion for Summary Judgment as to all of Plaintiffs' Claims and as to Defendants' First and Third Counterclaims, filed April 15, 1996 **[Doc. No. 97]**, Plaintiffs' Supplemental Motion for Summary Judgment with Respect to Defendants' Second Counterclaim, filed April 15, 1996 **[Doc. No. 101]** and Defendants' Cross Motion for Summary Judgment, filed May 13, 1996 **[Doc. No. 133]**. A hearing was held on June 18, 1996, and the Court took the motions under advisement. The Court, having considered all briefs, oral arguments of counsel, and being otherwise fully advised, finds that Defendants' Cross Motion for Summary Judgment is well-taken and will be granted and Plaintiffs' Motion for Summary Judgment and Supplemental Motion for Summary Judgment will be denied.

STANDARD OF REVIEW

Summary judgment is an integral part of the Federal Rules of Civil Procedure, which are intended to " 'secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986) (quoting Fed. R. Civ. P. 1). Under Rule 56(c), summary judgment is appropriate when the court, viewing the record in light most favorable to the non-moving party, determines that there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law. *Thrasher v. B & B Chemical Co., Inc.*, 2 F.3d 995, 996 (10th Cir.1993). The movant bears the initial burden of showing there is an absence of evidence to support the nonmoving party's

case. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir.1991). Once the movant meets this burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

"The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of *material* fact." *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (emphasis added). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248, 106 S.Ct. at 2510 (citation omitted); *Carland v. Metropolitan Life Insurance Co.*, 935 F.2d 1114, 1118 (10th Cir.), *cert. denied*, 502 U.S. 1020, 112 S.Ct. 670, 116 L.Ed.2d 761 (1991).

HISTORY OF THE INDIAN GAMING REGULATORY ACT

A brief overview of the principles of Indian sovereignty is important to understanding the history and evolution of the law on Indian gaming. "Indian tribes retain 'attributes of sovereignty over both their members and their territory,' *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975), and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States,' *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154, 100 S.Ct. 2069, 2081, 65 L.Ed.2d 10 (1980)." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 107 S.Ct. 1083, 1087, 94 L.Ed.2d 244 (1987). State law may be applied to tribal Indians on their reservations, however, if Congress has expressly consented or under certain other limited circumstances when it does not interfere with or is not "incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Id.* at 207 & 215-17, 107 S.Ct. at 1087 & 1091-92.

Consistent with these established principles, the Supreme Court, in *Cabazon*, ruled that neither the State of California nor the County of Riverside had any authority to enforce its gambling laws within Indian reservations. *Id.* at 207, 107 S.Ct. at 1087. The Cabazon and Morongo Tribes were conducting bingo and card games which were open to the public. *Id.* at 204-05, 107 S.Ct. at 1085-86. Each Tribe was acting pursuant to tribal ordinances approved by the Secretary of the Interior. *Id.* Thereafter, the State began to insist that the two Tribes comply with a

State statute that did not prohibit the playing of bingo but imposed staffing, jackpot limit and separate fund requirements. *Id.* at 205 & 206 n. 3, 107 S.Ct. at 1086 n. 3. The violation of any of these requirements constitutes a misdemeanor. *Id.* at 209, 107 S.Ct. at 1088. The County of Riverside also sought to apply two local ordinances, one regulating *bingo* and the other prohibiting the playing of card games. *Id.* at 205-06, 107 S.Ct. at 1086-87.

The Tribes filed an action against the county seeking a declaratory judgment that the county did not have authority to apply its ordinances within the reservations and an injunction against their enforcement. *Id.* The State subsequently intervened, insisting that Congress had given the State express consent to apply its laws to Indians on their reservations pursuant to Pub.L. 280, 67 Stat. 588, as amended, 18 U.S.C. § 1162, 28 U.S.C. § 1360 and the Organized Crime Control Act, 84 Stat. 937, 18 U.S.C. § 1955. *Id.* The district court held that neither the State nor the county had authority to enforce its gambling law on reservations and the Ninth Circuit affirmed. *Id.* The State appealed to the United States Supreme Court.

The Supreme Court determined that Congress had not expressly consented to California's application of its gambling laws within the reservation and then went on to consider whether exceptional circumstances nonetheless warranted the State's assertion of jurisdiction over the activities of Indians within the reservation. *Id.* at 214-22, 107 S.Ct. at 1090-95. This inquiry proceeds "in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Id.* at 216, 107 S.Ct. at 1092

(citations omitted). The Court acknowledged that the federal government sought to implement these important federal interests by approving of and promoting the gaming activities being conducted by the two tribes. *Id.* at 217, 107 S.Ct. at 1092-93. The Court noted that

> [t]hese policies and actions, which demonstrate the Government's approval and active promotion of tribal bingo enterprises, are of particular relevance in this case. The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major source of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members.

Id. at 218-19, 107 S.Ct. at 1093. The Court recognized that while the State's interest in preventing the Indian gaming activities from being infiltrated by organized crime was a legitimate concern, it was not "sufficient to escape the pre-emptive force of federal and tribal interests in gaming." *Id.* at 221. Thus, the Court concluded that State and county regulation of Indian gaming was impermissible. *Id.* at 221-22, 107 S.Ct. at 1094-95.

In 1988, in the wake of *Cabazon*, Congress enacted the Indian Gaming Regulatory Act ("IGRA" or "the Act"), 25 U.S.C. §§ 2701-2721, to balance the states' interest in regulating high stakes gambling within their borders and the Indians' resistance to state intrusions on their sovereignty. *See Lac du Flambeau Band of Lake Superior Chippewa*

Indians v. Wisconsin, 770 F. Supp. 480, 481 (W.D.Wis.1991), *appeal dismissed* 957 F.2d 515 (7th Cir.), *cert. denied, Wisconsin v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 506 U.S. 829, 113 S.Ct. 91, 121 L.Ed.2d 53 (1992); S.Rep. No. 100-446, 100th Cong., 2d Sess. at 13. The Act established a statutory framework for the growing Indian gaming industry which "expressly pre-empt[s] the field of governance of gaming activities on Indian lands." S.Rep. No. 100-446 at 6, 100th Cong., 2nd Sess., 1988 U.S.Code Cong. & Admin. News 3071, 3076. If the Act's requirements are satisfied, Indian gaming activities are exempt from federal criminal gambling prohibitions. *See* 15 U.S.C. §§ 1171-1178 (Johnson Act); 18 U.S.C. § 1166 (Gambling in Indian Country); 18 U.S.C. § 1955 (Organized Crime Control Act).

The Act classifies all Indian gaming activities as Class I, II, or III. Each class has a different regulatory scheme. Class I gaming includes social games played for prizes of minimal value and other traditional Indian games engaged in as a part of tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). Class I gaming is within the exclusive jurisdiction of the Indian tribe and is not subject to the provisions of the Act. 25 U.S.C. 1 2710(a)(1). Class II gaming includes bingo, certain non-banking card games not prohibited by state law, pull-tabs, lotto, punch boards and other games similar to bingo if played in the same location as bingo. 25 U.S.C. § 2703(7)(A). Class II games are allowed on tribal lands if: (1) such lands are located in a state which permits such gaming for any purpose by any person and (2) the gaming is conducted pursuant to a properly adopted and approved tribal ordinance. 25 U.S.C. § 2710(b). Class III gaming consists of all gaming

that is not Class I or Class II gaming. 25 U.S.C. Section 2703(8). Generally, Class III gaming, includes but is not limited to the following: banking card games; casino games such as roulette, craps and keno; any slot machines and electronic or electromechanical facsimiles of any game of chance; pari-mutuel wager on horse racing, dog racing, or jai alai; and lotteries. 25 C.F.R. § 502.4. The requirements for Class III gaming are essentially identical to those for Class II gaming but the Act imposes an additional requirement that Class III gaming be conducted in conformance with a tribal-state compact entered into by the Indian tribe and the State that is in effect. 25 U.S.C. § 2710(d)(1). Only Class III gaming is at issue in this case.

FACTUAL BACKGROUND

The undisputed facts for purposes of the cross-motions before the Court are as follows: Plaintiffs Pueblo of Santa Ana, Pueblo of San Juan, Pueblo of Tesuque, Pueblo of Acoma, Pueblo of Sandia, Pueblo of Isleta, Pueblo of Pojoaque, and Pueblo of Taos are federally recognized Indian tribes. Plaintiff San Felipe Gaming Enterprise Board is a gaming enterprise charged under the laws of the Pueblo of San Felipe. (Plaintiffs are collectively referred to as the "Tribes"). Beginning as early as 1986, Plaintiff Sandia Pueblo began offering Class III gaming on its reservation. After the IGRA was enacted in 1988, but before Plaintiff Tribes executed compacts with Governor Johnson in 1995, the remaining Plaintiff Tribes, except Taos and San Felipe, began to conduct some form Class III gaming activity on their reservations. In 1994, the gaming Tribes who were conducting some form of

Class III gaming without compacts entered into non-prosecution agreements with the United States Attorney whereby the Tribes agreed not to expand their gaming activities beyond specified levels in exchange for the United States Attorney's agreement not to take any enforcement action against them for failing to comply with the provisions of the IGRA.

In November 1994, New Mexico Governor Gary Johnson's administration began negotiating compacts with the Plaintiff Tribes. Between February 13, 1995 and March 1, 1995. Governor Johnson and a representative from each Tribe signed the compacts. There is no evidence that compacts were ever submitted to the legislature for approval. On March 15, 1995, the Secretary of the Interior ("Secretary") approved the compacts executed by the Pueblos of Santa Ana, San Juan, Taos, Pojoaque, Sandia, Tesuque, Isleta, and San Felipe and notice of the Secretary's approval was published in the Federal Register on March 22, 1995. The Secretary approved the tribal-state compact signed by Acoma Pueblo on April 24, 1995. Notice of the Secretary's approval of this compact was published in the Federal Register on May 15, 1995.

The United States Attorney advised the Tribes on March 21, 1995 that he was terminating their non-prosecution agreements, indicating that the execution, approval and publication of Tribes' compacts should bring them into compliance with applicable federal law. In response to concerns raised by State House Speaker Raymond Sanchez that Governor Johnson did not have the authority to sign the compacts on behalf of the State. Secretary Babbitt stated, in an April 5, 1995 letter to

United States Senator Jeff Bingaman, that notwithstanding his approval, "[w]e agree that compacts between Indian tribes and states are valid only if entered into by the appropriate state officials."

This action was prompted by two New Mexico Supreme Court opinions which address the legalities of Indian gaming in New Mexico. On July 13, 1995, the New Mexico Supreme Court ruled that Governor Johnson lacked the authority to sign the compacts on behalf of the State, and that "no gaming compacts exist between the Tribes and Pueblos and the State of New Mexico." *State ex rel. Clark v. Johnson*, 120 N.M. 562, 578, 904 P.2d 11, 27 (1995). On November 29, 1995, the New Mexico Supreme Court issued another opinion indicating that New Mexico law does not authorize any form of "casino-style gambling" and thus the Tribes have not satisfied the requirement that Class III gaming activities be located in a state which permits such gaming for any purpose by any person. *Citation Bingo, Ltd. v. Otten*, 121 N.M. 205, 207-08, 910 P.2d 281, 283-84 n. 2 (1995).

Based on *Clark* and *Citation Bingo*, the United States Attorney took the position that the Tribes' Class III gaming activities are in violation of federal law. The United States Attorney warned the Tribes that their gaming activities must cease or casino employees and patrons will be subject to federal criminal sanctions and the alleged illegal gaming devices will be subject to forfeiture. The Tribes assert through this action that their compacts with the State are valid and in effect pursuant to federal law and that the scope of gaming they offer was permitted by any person for any person in New Mexico at the time the compacts were signed which was prior to

the State Supreme Court's decisions in *Clark* and *Citation Bingo*. The Tribes seek a declaration of their right to continue conducting gaming activities on their reservations. The United States filed a counterclaim asserting that the Tribes' gaming activities fail to satisfy the requirements of IGRA and are therefore unlawful. The United States also joined the State of New Mexico as a party.

DISCUSSION

Class III gaming is lawful on tribal reservations only if such activities are:

> (A) authorized by an ordinance or resolution that –
>
> > (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
> >
> > (ii) meets the requirements of subsection (b) of this section, and
> >
> > (iii) is approved by the Chairman,
>
> (B) located in a State that permits such gaming for any purpose by any person, organization or entity, and
>
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect.

25 U.S.C. § 2710(d)(1). With regard to the third requirement, the Tribes assert that the Secretary's approval of the compacts is conclusive as to their validity notwithstanding the New Mexico Supreme Court's ruling that

the compacts are invalid under State law. Although it does not contest that the compacts are "in effect" for IGRA purposes, the United States asserts that the Court need not reach this issue. Instead, the United States urges the Court to decide the issue based on the Tribes failure to satisfy Section 2710(d)(1)(B) of the IGRA which requires that a tribe's Class III gaming activities be located in a state that permits such gaming for any purpose by any person, organization or entity. The State of New Mexico, on the other hand, asserts that notwithstanding the Secretary's approval, the compacts are invalid because Governor Johnson did not have the authority to sign the compacts on behalf of the State.

The Court begins its analysis by determining whether the Tribes have satisfied Section 2710(d)(1)(C) of the IGRA, that is, whether there is a tribal-state compact that is in effect because this issue is dispositive of the controversy before the Court. To resolve this issue, the Court must undertake the task of prescribing a reasonable meaning to this provision of the Act. In doing so, the Court starts with a few established maxims of statutory construction.

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, *see e.g., Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860, 106 S.Ct. 1600, 1606, 89 L.Ed.2d 855 (1986), or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 108 S.Ct. 626, 630, 98 L.Ed.2d 740 (1988); *Massachusetts v. Morash*, 490 U.S. 107, 115, 109 S.Ct. 1668, 1673, 104 L.Ed.2d 98 (1989) (in interpreting statutory language, a court looks to provisions of the whole law and to its object and policy); *Aulston v. United States*, 915 F.2d 584, 589 (10th Cir.1990) (same), *cert. denied*, 500 U.S. 916, 111 S.Ct. 2011, 114 L.Ed.2d 98 (1991); *Bridger Coal Co./Pacific Minerals, Inc. v. Director, O.W.C.P.*, 927 F.2d 1150, 1153 (10th Cir.1991) (statute must not be construed in a way which renders words or phrases meaningless or superfluous).

With these principles in mind, an examination of various provisions of the IGRA which relate to the requirements of Class III gaming leads to the conclusion that a valid compact is a prerequisite to the Secretarial approval necessary to put the compact "in effect". First, Section 2710(d)(3)(C) of the Act explains that the criminal prohibitions against gaming contained in the Johnson Act "shall not apply to any gaming conducted under a Tribal-State compact that – (A) is entered into . . . by a State in which gambling devices are legal, and (B) is in effect." (emphasis added). In this Section, the compact requirement is separated from the requirement that the compact be approved by the Secretary by the conjunctive term "and", indicating that Congress recognized as distinct the existence of a valid tribal-state compact and the approval of the Secretary putting that compact into effect. *United States v. O'Driscoll*, 761 F.2d 589, 597-98 (10th Cir. 1985) (conjunctive terms indicate that all requirements must be satisfied), *cert. denied, O'Driscoll v. United States*, 475 U.S. 1020, 106 S.Ct. 1207, 89 L.Ed.2d 320 (1986); Norman J.

Singer, Statutes and Statutory Construction, Vol. 1A, § 21.14 (same). Second, Section 2710(d)(3)(B) of the Act, which addresses compact negotiations, states: "Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." (emphasis added [sic]). The context of this provision further implies that the IGRA requires the existence of a valid Tribal-State compact independent of the requirement that the compact be in effect by virtue of the Secretary's approval.

The foregoing reading of Section 2710(d)(1)(C) is reinforced by the purposes of the Act. The articulated legislative purposes of the IGRA is:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
>
> (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian

> Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702. The differences between the requirements for Class II gaming and Class III gaming demonstrate that the central purpose of the Act's Class III gaming provisions is to protect against the infiltration of organized crime into high-stakes gaming. Class II games are allowed on tribal lands if: (1) such lands are located in a state which permits such gaming for any purpose by any person and (2) the gaming is conducted pursuant to a properly adopted and approved tribal ordinance. The requirements for Class III gaming are essentially identical to those for Class II gaming, but the Act imposes an additional requirement for Class III gaming which dictates that such gaming be conducted in conformance with a tribal-state compact entered into by the Indian tribe and the State that is in effect. *Compare* 25 U.S.C. § 2710(b) and 25 U.S.C. § 2710(d). The additional requirement shows that Congress was more concerned with negative consequences associated with high-stakes Class III gaming and thus allowed states to have more involvement in such gaming activities in order to protect tribes and other state residents. In large part, the state provides this protection in the form of regulatory oversight. *See e.g.*, 25 U.S.C. § 2710(d)(3)(C) & (5) (indicating the various regulatory provisions subject to negotiation). The State is given the opportunity to negotiate for a significant regulatory role over Class III gaming through "the tribal-state compact process, the means Congress devised to balance the states' interest in regulating high stakes gambling within

their borders and the Indians' resistance to state intrusions on their sovereignty." *Lac du Flambeau*, 770 F. Supp. at 481; S.Rep. No. 100-446, 100th Cong., 2d Sess. at 13. To find that Secretarial approval somehow overrides the compact requirement would frustrate an important purpose of the Act. See S. Rep. No. 100-446 at 6, 100th Cong., 2nd Sess., 1988 U.S. Code Cong. & Admin.News 3071, 3076 (IGRA "does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-State compact.").

Further, the mediation provision of the Act demonstrates just how important Congress thought it was to grant states a meaningful role over tribal gaming within its borders. 25 U.S.C. § 2710(d)(7)(B). Only after rejecting several opportunities to involve itself in the negotiation process does the Act terminate the State's opportunity to participate. In this situation, the Secretary, in consultation with the tribes, will prescribe procedures under which Class III gaming may be conducted on tribal lands. This lends support to the Court's conclusion that Congress did not intend that the Secretary's approval override deficiencies in the compact under state law. Although the continuing validity of the mediation provision is in question as a result of the Supreme Court's opinion in *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), it is still a good measure of Congressional intent. ___ U.S. ___, ___ 116 S.Ct. 1114, 1133, 134 L.Ed.2d 252. The federal government, having plenary power over Indian affairs, could have enacted legislation permitting Indian tribes to conduct all forms of gaming on their reservations without any input from

states. Instead, however, Congress gave states a significant role in the scheme. The Court's interpretation of the language and policy of Section 2710(d)(1)(C) avoids rendering the required compact process meaningless.

Two Federal District Courts have concluded that

> nothing in the IGRA even suggests that Congress intended that the Secretary determine who is authorized to execute compacts on behalf of states. Furthermore, such a intent should not be imputed to Congress, because it is patently unreasonable to expect that potentially complex questions of that nature can be adequately addressed during the 45 day review mandated by the IGRA.

State of Rhode Island v. The Narragansett Indian Tribe, No. 94-0619-T, slip op. at 4, 1996 WL 97856 (D.R.I. Jan. 21, 1995); *The Apache Tribe of the Mescalero Reservation v. State of New Mexico*, Civ. No. 92-0076 JC/WWD, slip op. at 13 (D.N.M. June 6, 1996) (quoting *Narragansett* with approval). This view is supported by the letter drafted by the Secretary shortly after he approved Acoma Pueblo's gaming compact, stating that he "agree[s] that compacts between Indian tribes and states are valid only if entered into by the appropriate State official." Letter From Secretary of the Interior Bruce Babbitt to New Mexico Senator Jeff Bingaman of April 5, 1995. Although the Act's language and purpose indicate that a valid compact is required, the court is unconvinced that such a ruling should be based on the argument that it is unreasonable to expect the Secretary to delve into complex issues of State law. The purpose of the 45-day review period is merely a deadline necessary to ensure that the Secretary

does not delay approval of a compact when both a tribe and a state urge its approval.

This Court's ruling in no way implies that the Secretary's approval of the compacts constitutes an abuse of discretion. The Court only finds that his approval is a separate requirement which puts a valid compact into operation. The Secretary's approval cannot in itself validate an otherwise invalid compact. In ruling that the Secretary cannot validate an invalid compact merely by giving it his stamp of approval, the Court need not reach the question of whether the Secretary properly approved the compacts in this case.

The validity of the Plaintiff Tribes' gaming compacts presents a federal question to be decided by this Court. *See State ex rel. Dyer v. Sims*, 341 U.S. 22, 28, 71 S.Ct. 557, 560, 95 L.Ed. 713 (1951). This issue cannot be unilaterally decided by the State, however, as the State is purportedly a party to the compact. *Id.* ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States."). In *Dyer v. Sims*, for example, West Virginia's legislature approved a water sanitation compact along with seven other states. Subsequently, the West Virginia Supreme Court of Appeals held that the legislative act of approving the compact was invalid pursuant to the State's constitution. The United States Supreme Court ruled that it had the final authority to determine the validity of the State's actions, and that the State court's opinion was not conclusive. Nonetheless, the Supreme Court indicated that "every deference will be

shown to what the highest court of a state deems to be the law and policy of its State, particularly when recondite or unique features of local law are urged." 341 U.S. at 28, 71 S.Ct. at 560. The Supreme Court then proceeded to examine state law to determine if there was a violation of the state constitution. Interstate compact cases such as *Dyer* are analogous to the extent they hold that disputes arising under compacts present a question of federal law because here New Mexico is purportedly a party to agreements with other sovereigns just as in the compact cases a state is a party to an agreement with another state. *See Kickapoo Tribe v. Babbitt*, 827 F.Supp. 37, 44 (D.D.C.1993) (concluding that validity of a gaming compact is a federal question), *rev'd on other grounds*, 43 F.3d 1491 (D.C. Cir. 1995). Accordingly, this Court will examine the validity of the Tribes' gaming compacts.

On July 13, 1995, shortly after the Secretary approved the compacts, the New Mexico Supreme Court ruled that the compacts were invalid because the Governor did not have the authority pursuant to the constitutional separation of powers doctrine to bind the State to such agreements. *State ex rel. Clark v. Johnson* 120 N.M. 562, 904 P.2d 11 (1995). For several reasons, the State court ruled that the Governor's actions unduly encroached on the Legislature's authority. For example, the State court reasoned that the compacts attempt to create new law and that this is a legislative function. The State court further concluded that the compacts potentially foreclose the Legislature from ever enacting legislation which would adversely impact Indian gaming in New Mexico. 120 N.M. at 574, 904 P.2d at 23. Consequently, the State court held that it was the Legislature's function to enter into compacts on

behalf of the State. The Legislature would have had to approve or ratify the Tribes' gaming compacts for them to be deemed valid. 120 N.M. at 575, 904 P.2d at 24. The State court went on to analyze two State statutes, the Joint Powers Agreement Act and the Mutual Aid Act, to determine if they delegated to the Governor the authority to sign the gaming compacts on behalf of the State but found that they did not confer any such authority upon the Governor. Finally, the State court found that "Congress, in enacting the IGRA, [did not seek] to invest state governors with powers in excess of those that the governors possess under state law." 120 N.M. at 577, 904 P.2d at 26.

The Tribes assert that, contrary to *Clark*, the Governor had the authority under the IGRA to sign the compacts on behalf of the State. It is true that nothing in the IGRA that specifies which state official(s) may sign a gaming compact on behalf of the state. However, precisely because the IGRA is silent on this issue, this Court concludes that Congress intended that state law determine the procedure for executing valid gaming compacts. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979) (concluding that state law determines appropriate procedure to be followed by state to assert jurisdiction over acts committed by Indians on the reservation when the federal statute is silent). Accordingly, this Court reexamined New Mexico law independent of the *Clark* case to determine, as a matter of federal law, whether Governor Johnson had authority to sign the compacts on behalf of the State. Having thoroughly examined applicable New Mexico law, this Court reaches the same conclusion as did

the State court in *Clark*, namely that Governor Johnson's actions encroached upon the Legislature's authority, contrary to the constitutional separation of powers doctrine.

This Court is unpersuaded by the Tribes' contention that because the State would have no authority over Indian gaming absent the IGRA, consenting to a gaming compact pursuant to the Act involves no compromise of a state's own legislative function. On this basis, the Tribes assert that the Governor did not unduly intrude upon the Legislature's law-making function as asserted in *Clark*. It is immaterial, however, that the State would have no authority over Indian gaming absent the IGRA. Because the State was granted some authority over Indian gaming, that authority must be exercised by the appropriate governmental official(s). *Compare Willis v. Fordice*, 850 F. Supp. 523 (S.D.Miss.1994) (holding that governor had authority to execute compact on behalf of State pursuant to state statute that provides that the governor shall transact all the business of the state with any other state or territory). For these reasons, the Court holds that Governor Johnson lacked the authority to enter into compacts with the Tribes and thus the compacts are invalid as a matter of federal law.

Notwithstanding any *ultra vires* action by the Governor, the Tribes still maintain that the compacts are valid as a matter of federal law. The Tribes rely on several cases involving state retrocession of jurisdiction over acts committed by Indians on reservations to the United States for the proposition that the Secretary's approval of the compacts conclusively establishes their validity. *See e.g., United States v. Lawrence*, 595 F.2d 1149 (9th Cir.), *cert. denied, Lawrence v. United States*, 444 U.S. 853, 100 S.Ct.

108, 62 L.Ed.2d 70 (1979); *United States v. Brown,* 334 F.Supp. 536 (D.Neb.1971); *Omaha Tribe of Nebraska v. Village of Walthill,* 334 F.Supp. 823 (D.Neb.1971), *aff'd* 460 F.2d 1327 (8th Cir. 1972), *cert. denied,* 409 U.S. 1107, 93 S.Ct. 898, 34 L.Ed.2d 687 (1973); *see also Leser v. Garnett,* 258 U.S. 130, 42 S.Ct. 217, 66 L.Ed. 505 (1922) (holding that, State's ratification of proposed constitutional amendment became valid upon Secretary's certification despite legislature's lack of authority to ratify amendment). The retrocession cases developed as follows: In 1953, Congress enacted legislation transferring all jurisdiction, civil and criminal, over the Indian country within certain states. *Lawrence,* 595 F.2d at 1150. Other states were given the option of assuming jurisdiction over acts committed on reservations. *Id.*

> The action of Congress in placing jurisdiction over Indians in the hands of states had as its purpose the elimination of legal impediments standing in the way of the Indian becoming a first class citizen. Congress apparently assumed that subjecting the Indian to equality of the responsibilities of state law would make him equal in all respects to other citizens of the state.
>
> In 1968, the Congress authorized the United States to take back, via retrocession from [states] "all or any measure" of the jurisdiction transferred to the state [previously].

Brown, 334 F. Supp. at 537-38; *see also* 25 U.S.C. § 1323. The above cited retrocession cases hold that when the Secretary accepts a facially valid retrocession by a State, subsequent state law challenges to the validity of the State action have no effect on the validity of the retrocession for federal law purposes. The courts reason that it

would be difficult for federal officials to delve into issues of state law and thus "[s]omewhere along the line, if only for the purpose of finality," federal officials must be able to rely on a facially valid act of the state. *Brown*, 334 F. Supp. at 540; *see also Lawrence*, 595 F.2d at 1151; *Walthill*, 334 F. Supp. at 829-33. The courts also note that the federal government had spent large sums of money and manpower in reassuming jurisdiction over the reservations in reliance on the state's action. *Brown*, 334 F. Supp. at 540; *Walthill*, 334 F. Supp. at 827.

This line of reasoning has been adopted in the context of Indian gaming. *Langley v. Edwards*, 872 F. Supp. 1531 (W.D. La. 1995), *aff'd mem.*, 77 F.3d 479 (5th Cir. 1996). The action in *Langley* was brought by dissident tribal members challenging the validity of their tribe's gaming compact, in part, because the governor could not, without legislative approval, bind the state to the provisions of a gaming compact. The court noted that the "IGRA expresses a congressional policy of putting compacts into force quickly, by requiring the Secretary to approve or reject them within forty-five days of their submission." *Id.* at 1535 (citation omitted). With that policy consideration in mind, the court held that a compact

> cannot be invalidated on the basis of the governor's *ultra vires* action, because a contrary rule would compel the Secretary to consider state law before approving any compact. That, the court stated would lead to endless delay. Since that result is contrary to the congressional intent expressed in the IGRA, it must be avoided by independent state law challenges.

Id. at 1535 (citations and internal quotations omitted). At first blush, *Langley*'s reliance on the retrocession cases appears compelling. However, after a careful comparison of the language and purpose of the two statutory schemes, the Court finds *Langley*'s reliance on the retrocession cases unpersuasive.

On the one hand, the retrocession statute merely states: "The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction. . . . " 25 U.S.C. § 1323. State retrocession is a one-time event between the state and the United States. "The federal government, having plenary power over the Indians, had the power to prescribe any method or event it desired to trigger its own reassumption of control over Indian affairs within a state. In fact, the triggering event could have been devoid of any mention of state action at all." *Brown*, 334 F. Supp. at 540. Further, the policy and intent of this statute strongly favors federal jurisdiction. *Omaha Tribe of Nebraska v. Village of Walthill*, 334 F. Supp. at 834. Construing the statute to permit the United States to accept an invalid state retrocession for purposes of finality does not compromise the intent of the statute which is to permit the United States to regain jurisdiction over civil and criminal causes of action involving Indians on their reservations.

On the other hand, a gaming compact is an ongoing agreement which, unlike a retrocession, imposes affirmative duties upon the state. The Court questions whether the United States has the power to require a state to affirmatively regulate gaming pursuant to an agreement never consented to by the state. The retrocession cases are also distinguishable because the underlying policy goal

of finality is not as important in the context of gaming. Acknowledging that some states were profoundly concerned about the negative spill-over effects gaming might have on it and their citizens, the Act granted the states a more specific and vital role than that given states pursuant to the retrocession statute. *See* 25 U.S.C. § 2702(2) (stating that one of the purposes of the Act is to shield the tribes from organized crime and other corrupting influences); S. Rep. No. 100-446 at 2, 100th Cong., 2nd Sess., 1988 U.S. Code Cong. & Admin. News 3071 and 3075 (gaming legislation intended to protect the tribes and state from unscrupulous persons and to balance their competing economic interests). IGRA's provisions reveal that Congress took great pains to provide states a meaningful opportunity to become intimately involved in the regulation of gaming in order to protect themselves and the tribes from gaming's possible negative effects. IGRA's mediation provision, for example, demonstrates just how important Congress felt it was to give states the opportunity to negotiate a significant regulatory role over Class III gaming in order to protect against the possible negative consequences associated with such gaming. 25 U.S.C. § 2710(d)(7)(B). Only after rejecting several opportunities to involve itself in the negotiation and mediation process does the Act terminate the State's opportunity to assert a role over Indian gaming. This lends support to the Court's conclusion that Congress did not intend that the Secretary's approval override deficiencies in the compact under state law. As stated earlier, notwithstanding its questionable validity in light of *Seminole*, the mediation provision is still a good measure of Congressional intent. Thus, to achieve Congress' policy goal, the Court must

construe the IGRA as requiring a valid tribal-state compact. To hold otherwise would forever strip away the State's ability to protect itself and the Tribes from the negative effects of gaming, contrary to the Act's purpose. The policy argument of finality must, therefore, give way to the overarching concern of the IGRA which is to protect states and tribes from negative effects associated with gaming, especially when such problems potentially cross reservation borders. The opinion in *Langley* does not address the implications of allowing a state official's *ultra vires* action to compromise the State's ability to protect itself and the Tribes from the infiltration of organized crime and other negative effects.

In sum, the Court has ruled that the Tribal-State compacts are invalid and thus the Tribes have failed to satisfy a requirement necessary for them to conduct Class III gaming. It is therefore unnecessary to determine whether the Tribes' gaming is being conducted pursuant to a duly adopted tribal ordinance or whether New Mexico allows such gaming for any purpose by any person. That said, the Court feels compelled to express its concern that today's ruling taken together with the Supreme Court's recent decision in *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) confers substantially more power upon the State than Congress intended. The Supreme Court in *Seminole* held that the Eleventh Amendment prevents Congress from authorizing suits by Indian tribes against States to enforce the provisions of the IGRA. Today's ruling could result in New Mexico's refusal to negotiate new compacts with the Tribes. In such a situation, the Tribes would be

without recourse in light of *Seminole*, as they could not bring suit against the State for refusing to negotiate.

As the Court stated earlier, Congress intended that the Act balance the State and Tribes' interests through the compact negotiation process. Contrary to Congress' intent, today's ruling combined with the Supreme Court's decision in *Seminole* has essentially given the State veto power over Indian gaming in New Mexico. The Court does not have the authority, however, to rewrite the Act "in order to approximate what we think Congress might have wanted had it known" the effect today's ruling would have on the Plaintiff Tribes in light of *Seminole*. *Id.* at 1133. "If that effort is to be made, it should be made by Congress, and not by the federal courts." *Id.*

ALTERNATIVE CLAIMS ASSERTED BY THE TRIBES

The Tribes assert various alternative theories for relief. The Tribes claims asserted pursuant to the Contracts Clause and Takings Clause must fail. The Contracts Clause does not apply to the federal government. *See Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 n. 9, 104 S.Ct. 2709, 2719 n. 9, 81 L.Ed.2d 601 (1984). Nonetheless, the Fifth Amendment's Due Process Clause does prohibit the United States from impairing contractual obligations except in the exercise of its police power. *National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe Railway Co.*, 470 U.S. 451 (1985). The Court need not discuss this claim further as no valid Tribal-State compact exists. The Tribe's claim pursuant to the Takings Clause is similarly without merit because the Tribes did not previously have the right to offer Class III

gaming on their reservations. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1027, 112 S.Ct. 2886, 2899, 120 L.Ed.2d 798 (1992) (holding that, to assert a viable claim pursuant to the Fifth Amendment's Takings Clause, Plaintiff must have a cognizable property right).

The Tribes also assert a breach of trust claim on the basis that the United States has a trust responsibility to protect the Tribes' rights under the gaming compacts. A limited trust relationship does exist between the United States and Indian tribes. *United States v. Mitchell,* 445 U.S. 535, 542, 100 S.Ct. 1349, 1353-54 (1979) ("Mitchell I") (indicating that only a limited trust relationship exists unless statute unambiguously imposes a duty on the government to act); *Vizenor v. Babbitt,* 927 F.Supp. 1193, 1199-1203 (D.Minn.1996); *Montana Bank of Circle v. United States,* 7 Cl.Ct. 601, 613 (1985). This limited trust relationship does not in itself, however, impose duties upon the United States such as those applicable to private trustees. *Montana* at 613-614. To impose such obligations, the substantive law at issue must unambiguously impose upon the United States detailed, comprehensive duties over Indian affairs. *Id.* at 614; *United States v. Mitchell,* 463 U.S. 206, 221, 103 S.Ct. 2961, 2970, 77 L.Ed.2d 580 (1983) ("Mitchell II") (Congress specifically directed Interior Department on method of managing Indian forest resources); *Pawnee v. United States,* 830 F.2d 187 (Fed. Cir.1987) (statute establishes fiduciary obligations as it grants the Secretary of the Interior authority to determine whether to consent to lease of Indian mineral lands, the terms of the lease, enact regulations necessary to carry out legislation), *cert. denied,* 486 U.S. 1032, 108 S.Ct. 2014, 100 L.Ed.2d 602 (1988). In this case, the IGRA requires the

Secretary to review and approve the gaming compacts. The Act does not unambiguously impose upon the United States the duty to ensure that Indian gaming continue under any circumstances. *See Mitchell I*, 445 U.S. at 541-02, 100 S.Ct. at 1353 (ruling that Act which provides that United States shall hold allotted land "in trust for the sole use and benefit" of the allottees only creates a limited trust relationship.). The Secretary has no detailed, comprehensive control over the daily management of the casino or the money earned by such operations. Moreover, the Tribes have presented no evidence that the Secretary abused his discretion or violated the law by approving the compacts. Thus, the IGRA cannot be fairly interpreted as imposing fiduciary obligations upon the United States. *See Montana Bank*, at 614 (concluding that the Secretary's obligation to review and approve contracts is "not comparable in purpose or degree to the control or supervision of tribal monies or properties that has been found to establish a complete fiduciary relationship with a duty to account as a trustee").

Lastly, the Tribes claim that they reasonably and in good faith relied upon the validity and certainty of the Secretary's approval of the compacts and as a result have incurred substantial debt in expanding and improving their gaming facilities. Consequently, the Tribes assert that the United States should be equitably estopped from taking any federal criminal enforcement action against them. "[E]quitable estoppel responds to the unfairness inherent in denying the claimant some benefit after it has reasonably relied on the misrepresentations of the adverse party." *United States v. Marine Shale Processors*, 81 F.3d 1329, 1348 (5th Cir.1996). An equitable estoppel claim

asserted against the government, however, will succeed only under extraordinary circumstances. *DePaolo v. United States*, 45 F.3d 373, 376 (10th Cir.1995) (quoting *County Comm'rs v. Isaac*, 18 F.3d 1492, 1498 (10th Cir. 1994)). " 'Courts generally disfavor the application of the estoppel doctrine against the government and invoke it only when it does not frustrate the purpose of the statutes expressing the will of Congress or unduly undermine the enforcement of the public laws.' " *Id.* (quoting *FDIC v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir.1994)); *Marine Shale Processors*, 81 F.3d at 1348 (5th Cir.1996). In *Office of Personnel Management v. Richmond*, 496 U.S. 414, 429, 110 S.Ct. 2465, 2474, 110 L.Ed.2d 387 (1990), the Supreme Court expressed concern that "[j]udicial adoption of estoppel based on agency misinformation would . . . vest authority in these agents that Congress would be powerless to constrain." "Were the courts to estop the United States readily, the executive branch could use this doctrine strategically to achieve results Congress intended to prevent, thus delivering lawmaking power to the executive in a manner that the [statute] does not contemplate." *Marine Shale Processors*, 81 F.3d at 1348.

Recently, the Supreme Court cast doubt on whether it would allow an estoppel defense against the government under any set of circumstances. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 110 S.Ct. 2465, 110 L.Ed.2d 387. Even assuming estoppel can be successfully asserted against the government, the claimant must demonstrate that: (1) the government knew the facts; (2) the government intended its conduct to be acted upon or so acted that plaintiffs had the right to believe it was so intended; (3) plaintiffs must have been ignorant of the

true facts; and (4) plaintiffs reasonably relied on the government's conduct to their injury. *DePaolo*, at 377; *City of New York v. Shalala*, 34 F.3d 1161, 1168 (2nd Cir.1994) (with respect to fourth factor, reliance must be reasonable). In addition to these four requirements, the Supreme Court has indicated that the claimant must make a showing of affirmative misconduct on the part of the government. *DePaolo* at 376-377. "Affirmative misconduct means an affirmative act of misrepresentation or concealment of a material fact. Mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct." *Id.* at 377 (quoting *Isaac*, 18 F.3d at 1499).

At the hearing, the only facts offered by Tribes to support a finding of affirmative misconduct are the Secretary's initial approval of the compacts and his subsequent position that the casinos must cease their operations because of the New Mexico's Supreme Court's opinions in *State ex rel. Clark v. Johnson* and *Citation Bingo*. These facts by no means support a finding that the Secretary committed an affirmative act of misrepresentation or concealed a material fact. The Tribes have failed to meet their burden to show that the Secretary's actions constituted affirmative misconduct.

In addition to offering the above facts to support a showing of affirmative misconduct, the Tribes argue that the affirmative misconduct requirement need not be satisfied when the case arises under circumstances in which the government has a trust relationship with the claimant. The Tribes rely on *Prieto v. United States*, 655 F.Supp. 1187 (D.D.C.1987) and *Pangilinan v. Castro*, 1985 WL 3792 (D.N. Mariana Islands 1985), *aff'd De Mesa v. Castro*, 844

F.2d 642 (9th Cir.1988), for this proposition. These cases are distinguishable, however. Both *Prieto* and *Pangilinan* rely on the government's fiduciary obligations to the claimant in making the determination that the estoppel claim is meritorious. As discussed earlier, the United States does not owe the Tribes such fiduciary duties because the IGRA does not grant the United States a detailed, comprehensive management role over Indian gaming. Thus, Plaintiffs must establish affirmative misconduct on the part of the Government. Having concluded that the Plaintiffs have not met their burden of establishing that the Secretary's conduct constituted affirmative misconduct, the Court finds it unnecessary to address the other elements of a governmental estoppel claim.

PUEBLO OF ACOMA'S MOTION TO STRIKE

The Court will not address the Pueblo of Acoma's motion to strike tribal counsel minutes, filed May 21, 1996 as the Court has not taken those exhibits into consideration in reaching its conclusion.

CONCLUSION

The language and intent of Section 2710(d)(1)(C) of the IGRA established that the appropriate state official(s) must execute gaming compacts on behalf of the State. This requirement is separate and independent from the requirement that the compact be "in effect". Because Governor Johnson did not have the authority to execute gaming compacts on behalf of the State of New Mexico, the Court finds that the compacts are invalid and thus the

Tribes have failed to satisfy a requirement necessary for them to conduct Class III gaming. Moreover, the Tribes have failed to make a sufficient showing on essential elements of their remaining claims with respect to which they have the burden of proof.

IT IS THEREFORE ORDERED that Defendants' Cross Motion for Summary Judgment, filed May 13, 1996 **[Doc. No. 133]** is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment as to all of Plaintiffs' Claims and as to Defendants' First and Third Counterclaims, filed April 15, 1996 **[Doc. No. 97]**, Plaintiffs' Supplemental Motion for Summary Judgment with Respect to Defendants' Second Counterclaim, filed April 15, 1996 **[Doc. No. 101]** are **DENIED**.

/s/ Martha Vazquez
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF SANTA ANA, et al.,

Plaintiffs,

vs. CIV NO. 96-0002 MV/DJS

JOHN KELLY, et al.,

Defendants.

and (Filed Jul. 25, 1996)

UNITED STATES OF AMERICA,

Counterclaimant,

vs.

PUEBLO OF SANTA ANA, et al.,

and

STATE OF NEW MEXICO,

Counterdefendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER came before the Court on Plaintiffs' Motion to Stay Judgment Pending Appeal, filed July 12, 1996 **[Doc. No. 182]**. The Court, having considered all briefs and being otherwise fully advised, finds that Plaintiffs' Motion to Stay Judgment Pending Appeal is well-taken and will be **granted.**

DISCUSSION

Plaintiffs filed a Notice of Appeal on July 25, 1996. The motion before the Court requests a stay of this

Court's July 12, 1996 judgment pending appeal, pursuant to Rule 62 of the Federal Rules of Civil Procedure. The Court's July 12 order held that the language and intent of Section 2710(d)(1)(C) of the Indian Gaming Regulatory Act ("IGRA" or the "Act"), 25 U.S.C. § 2701 *et seq.* establishes that the appropriate state official(s) must execute gaming compacts on behalf of the State. Because Governor Johnson did not have the authority to execute gaming compacts on behalf of the State of New Mexico, the Tribes' compacts are invalid and thus the Tribes have failed to satisfy a requirement necessary for them to conduct Class III gaming. Although Rule 62 does not expressly address the standard for a stay of a declaratory judgment, Plaintiffs assert that the Court may grant a stay pursuant to Rule 62(c) (injunction pending appeal) or 62(d) (stay upon appeal). The United States and the State of New Mexico argue that neither Rule 62(c) nor (d) are applicable and therefore the Court may not issue a stay in this case. Because Rule 62(c) is dispositive of the issues presented in Plaintiffs' motion, the Court need not determine whether a stay may warranted pursuant to Rule 62(d).

Rule 62(c) provides, in pertinent part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Fed.R.Civ.P. 62(c). This Court's July 12 order did not enjoin the Tribes from conducting Class III gaming activities. The Court's order, instead, is a declaratory judgment in which the Court ruled that the Tribes' gaming compacts are invalid, thereby making Class III gaming activities unlawful on Indian land within the State. Although Rule 62(c) ostensibly applies only to cases involving injunctive relief, the Tribes argue that the practical effect of the Court's declaratory judgment and the stipulation entered into by the Tribes and the United States is no different than that of an injunction. The stipulation entered into by the Tribes and the United States on January 23, 1995, and approved by this Court, provides that the Tribes will voluntarily cease Class III gaming operations within fifteen days of this Court's entry of a final judgment declaring that the tribal casinos are operating in violation of federal law, unless a stay pending appeal is granted by this Court or the Tenth Circuit Court of Appeals.

The Court concludes that Rule 62(c) does not apply to declaratory judgments. *See Shay v. Agricultural Stabilization and Conservation State Committee for Arizona*, 299 F.2d 516, 525 (9th Cir. 1962) (Rule 62(c) only applies to injunctions); *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 926 F. Supp. 888, 890 (D.S.D. 1996) (Rule 62(c) does not apply to a declaratory judgment). However, the Court agrees with the Tribes that the Court's declaratory judgment combined with the Court-approved stipulation have the practical effect of granting injunctive relief. *See Samuels v. Mackell*, 401 U.S. 66, 72-73 (1971) (practical effect of declaratory and injunctive relief is virtually identical). Thus, although Rule 62(c) may not

technically apply in the case, the standards by which Courts decide whether to stay an injunction pursuant to Rule 62(c) are applicable. "Rule 62(c) is 'merely expressive of a power inherent in the court to preserve the status quo where, in its sound discretion, the court deems the circumstances so justify.' " *McClatchy Newspapers v. Central Valley Typographical Union No. 46, International Typographical Union*, 686 F.2d 731, 734-35 (9th Cir.), *cert. denied*, 459 U.S. 1071 (1982) (quoting 7 J. Moore, Moore's Federal Practice ¶ 62.05, at 62-19 to 20 (2d ed. 1979)); *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988); *see also Hilton v. Braunskill*, 481 U.S. 770 (1987) (Rule 62(c) standards applied to motion for stay of judgment granting petition for writ of habeas corpus); *Spain v. Podrebarac*, 68 F.3d 1246 (10th Cir. 1995) (same). Moreover, as discussed below, the purpose of Rule 62(c) – which is to preserve the status quo pending appellate review – will be served if the Rule 62(c) standards are applied in this case because of the difficult issues presented and the widespread and profound effect s [sic] that would flow form [sic] enforcement of this Court's July 12 order. *See McClendon v. City of Albuquerque*, 79 F.3d, 1014 1020-21 (10th Cir. 1996). The Court therefore will apply the standards applicable to Rule 62(c) to determine whether a stay is warranted in this case.

The standard applied in determining whether to issue a stay pending appeal is generally the same as would be employed on application for a preliminary injunction. 7 Jeremy C. Moore et al., Moore's Federal Practice ¶ 62.05 (2nd ed. 1995). The Court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;

(2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding and (4) where the public interest lies." *Braunskill*, 481 U.S. at 776 (citations omitted). If the Tribes "can meet the other requirements for a stay pending appeal, they will be deemed to have satisfied the likelihood of success on appeal element if they show questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *McClendon*, 79 F.3d at 1020 (citations and internal quotations omitted). The Court will thus begin its analysis by addressing the second, third and fourth factors.

The Tribes assert that should the Tenth Circuit Court of appeals reverse this Court's decision they will have no way to recoup revenue lost as a result of closure while the appeal is pending. In the meantime, tribal programs and services that rely on gaming revenue will have to be terminated or suspended, greatly affecting persons that depend on such services as well as those persons not directly connected with gaming operations. The Tribes also assert that they may be forced to default on various outstanding debts. The United States, on the other hand, express an interest in enforcing federal law and claims that the Tribes may sell some of their assets if necessary and that the Tribes will continue to be able to generate revenue from bingo activities at the casinos.

The Tribes rely on *Sac and Fox Nation of Missouri v. LaFaver*, 905 F. Supp. 904, 907 (D.Kan. 1995) in support of their assertion that they will suffer irreparable harm if a

stay is not granted. In *Sac and Fox*, the Kansas Department of Revenue sought to impose a motor fuel tax on the retail sales of gasoline/diesel fuel on Indian lands. *Id.* at 906. The Plaintiff Tribes filed a motion for a temporary restraining order and a preliminary injunction. In ruling on the motion, the court noted that

> [t]he revenue generated from the sale of motor fuel was the primary revenue source for the tribes. The imposition of the tax would severely diminish the capacity of the Tribes to fund necessary services and programs to the members of the Tribes. There is also every likelihood that Tribal employees and administrative staff in the Tribes' business offices will be laid off as a result of the lost revenue. The lost revenue, therefore, has potentially devastating effects for people who are already impoverished.

Id. at 907. The court acknowledged that

> [u]nder normal circumstances, monetary loss may be remedied by an award of compensatory damages, and the risk of loss is therefore not considered irreparable. *See Holly Sugar Corp. v. Goshen County Coop. Beet Growers Ass'n*, 725 F.2d 564, 570 (10th Cir. 1984). Here, however, the court considers the consequences of such losses as extremely serious and potentially devastating to the Tribes. Such loss would indeed meet the irreparable harm test.

Id.

As in *Sac and Fox*, Class III gaming proceeds are the primary revenue source for the nine Plaintiff Tribes. There is no dispute that the Tribes have, for the first time,

been able to dramatically improve the lives of their members on the Pueblos and to experience the financial independence and security of true sovereigns. The record indicates that the Tribes have installed sewer and water systems, built learning and recreational centers, remodeled decaying houses, purchased an alcohol rehabilitation center, established health programs and summer youth employment programs, hired additional law enforcement officers, provided hot meals for Pueblo senior citizens, and awarded full college scholarships to Indian students. All of this has been funded by gaming revenues. These improvements are a part of life that many of us take for granted, but they are unprecedented advances for Native Americans living on Pueblos in New Mexico.

In addition, the Tribes now face potentially devastating financial losses with no other source of revenue to pay off their immense debts. The Tribes have incurred millions of dollars in debt to construct casinos, to purchase equipment, and to build roads and parking lots. The casinos employ thousands of employees, many of whom have made financial commitments presumably in reliance on an expectancy of continued employment at the casinos. Closure of the casinos will force some Tribes and casino employees to default on their financial commitments. The inability of the Tribes and casino employees to meet their financial commitments will in turn effect [sic] many New Mexicans who have contracted with the casinos to provide goods and services. However knowingly these risks may have been assumed, the loss of revenue from the immediate closure of the casinos would have devastating results on the lives of many

tribal members and other New Mexicans. Adding to the devastating effects of this Court's ruling on the lives of Native Americans living on Pueblos in New Mexico, Congress has slashed federal funding to tribes in anticipation that the tribes would generate significant revenues through gaming activities pursuant to IGRA[.] *See Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (in addressing requirements for issuance of a preliminary injunction, the court considered that loss of bingo revenue would mean a loss of income used to support social services for which federal funds have been reduced or are non-existent, and a loss of jobs for Indians who already face a staggering unemployment rate). For the foregoing reason, the Court concludes that the Tribes have demonstrated that substantial irreparable harm will result if this Court's order is not stayed.

The Court must next determine whether the United States and the State will suffer substantial harm if the stay is granted. The Tribes assert that "[w]hile the Defendants and the public at large undoubtedly have an interest in seeing that federal law is complied with, there is no indication that the federal or state government or the public at large will suffer any tangible harm as a result of a stay." Memorandum in Support of Plaintiffs' Motion to Stay Judgment Pending Appeal, p. 7. The Tribes assert that there are no serious allegations that the Tribes are conducting unfair games or that regulatory oversight has been lax. The United States and the State do not refute this assertion.

The Tribes cite the Court to *Washington Metro, Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) to support their position that the United States

and the State will not suffer substantial harm and that the public interest will not be adversely affected by a stay which will essentially allow the movant to continue to engage in conduct this Court has declared unlawful. In *Holiday Tours,* the district court granted a permanent injunction restraining the defendant from conducting bus tours without a certificate from the proper authority allowing the activity, but the court stayed its injunction pending appeal. *Id.* at 842. The court of appeals denied a motion to vacate the district court's stay, finding that the injunction threatened to destroy the tour bus operator's business whereas a stay would not substantially harm either the transit authority or other tour bus operators and was not contrary to the public interest. *Id.* at 843.

In this case the United States and the State have not specified any harm they may suffer, other than the inability to enforce gaming laws. For the past several years, the United States has chosen not to enforce criminal gaming laws, although it adamantly maintained that the Tribes conduct was illegal. The Court does not find that a stay pending appeal will substantially harm the United States or the State. In *Florida Businessmen for Free Enterprise v. City of Hollywood,* 648 F.2d 956 (5th Cir. 1981), the court of appeals stayed the district court's order upholding the constitutionality of a criminal ordinance which prohibited the use, possession with intent to use or deliver, delivery, manufacture, and advertisement of drug paraphernalia and enjoined enforcement of the ordinance pending appeal. The court concluded that enforcement of the district court's interpretation of the criminal ordinance should be stayed for several reasons: First, in similar decisions from other jurisdictions, only one court had

upheld virtually identical ordinances. *Id.* at 957. Second, the businessmen affected by the district court's order would suffer irreparable harm in the form of business losses if they were forced to refrain from selling "drug paraphernalia" and faced possible criminal prosecution if they continued to sell the proscribed items. *Id.* at 958. The court acknowledged the city's interest in enforcing its ordinance would suffer from a delay in enforcement, but determined that harm from delaying enforcement was slight, given the businessmen's potential for success on appeal. *Id.* at 959. For similar reasons, this Court finds that the delay in enforcement of federal gaming laws will not substantially injure the United States or the State.

The Court also must weigh the public interest. Congress, through IGRA, acknowledges competing public interests with regard to Class III gaming. The main focus of IGRA is to promote tribal economic development, tribal self-sufficiency, and strong tribal governments. *See* 25 U.S.C. § 2702. Indeed, the tribal gaming activities at issue here have created thousands of jobs and allowed the Tribes to fund a variety of necessary and important governmental and social services previously beyond their reach. On the other hand, Congress has determined that it is against the public interest to allow Indian tribes to conduct Class III gaming without giving states a significant role in the scheme as set forth in the Act, in order to protect the tribes from criminal influences that are often associated with such gaming activities. The United States, the State, and the public also have interests in enforcing criminal gaming laws. These competing public interests are important, but conflict in this case. In weighing them, the Court concludes that the United States and State's

interest must be subordinate to the public interest in promoting tribal economic well-being for the duration of this appeal given the devastation this Court's ruling will cause the Tribes, casino employees, and others providing goods and services to the casinos. Moreover, as discussed above, there has been no showing or allegation that criminal elements have infiltrated the Tribes' gaming activities in this case, nor have the United States and the State shown any strong inclination to prosecute violations of state and federal gaming laws in New Mexico prior to this case.

As the Tribes have made a substantial showing that the first three factors weigh heavily in favor of granting a stay pending appeal, they are deemed to have satisfied the likelihood of success on appeal element if they show "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *McClendon,* 79 F.3d at 1014 (citations and internal quotations omitted). The issues presented in this case are serious, complex, and novel. This is evidenced by the split among district courts regarding whether an otherwise invalid compact can be validated by the Secretary of the Interior's approval. *Compare The Apache Tribe of the Mescalero Reservation v. State of New Mexico,* Civ. No. 92-0076 JC/WWD, slip op (D.N.M. June 6, 1996) (holding that Secretarial approval does not validate an otherwise invalid compact); *State of Rhode Island v. The Narragansett Indian Tribe,* No 94-0619-T, slip op (D.R.I. Jan 21, 1995) (same); *Kickapoo Tribe v. Babbitt,* 827 F. Supp. 37 (D.D.C. 1993), *rev'd on other grounds,* 43 F.3d 1491 (D.C. Cir. 1995); *with Langley v. Edwards,* 872 F. Supp. 1531 (W.D. La. 1995),

aff'd mem., 77 F.3d 479 (5th Cir.1996) (holding that Secretarial approval overrides an otherwise invalid compact); *Willis v. Fordice*, 850 F. Supp. 523 (S.D. Miss. 1994) (although governor had statutory authority to sign compact on behalf of state, court indicated that compact was also valid as a matter of federal law because it was affirmatively approved by the Secretary of the Interior). Moreover, this Court was without guidance from the United States Supreme Court or any United States Court of Appeals on the issue of whether the Secretary of the Interior's approval validates a compact that is invalid under state law. The parties' actions also demonstrate the difficulty of the issues involved in this case. For example, the State Attorney General's office has issued a number of conflicting legal opinions on the gaming issue over the course of years. The state of the law in New Mexico at the time the compacts were signed only added to the confusion. In *Infinity Group, Inc. v. Manzagol*, 118 N.M. 632, 884 P.2d 523 (Ct. App. 1994), *cert. denied*, 118 N.M. 533, 882 P.2d 1046 (1994), the New Mexico Court of Appeals ruled that electronic simulations of pull tab games were permissible under State law. Not until after the compacts were approved by the Secretary did the New Mexico Supreme Court overrule *Infinity* and clarify that casino-style gaming was illegal in the State. *See Citation Bingo, Ltd. v. Otten*, 121 N.M. 281, 910 P.2d 281 (1995).

"[T]his standard does not require the [district] court to change its mind or conclude that its determination was erroneous." *St. Agnes Hospital v. Riddick*, 751 F. Supp. 75, 76 (D. Me. 1990). but merely acknowledges that "tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when

the equities of the case suggest that the status quo should be maintained" pending appellate review. *Holiday Tours*, 559 F.2d at 844-45. The Tribes have satisfied this element and the equities weigh in their favor. Thus, a stay is warranted in this case.

CONCLUSION

The Court recognizes that stays are sparingly granted and are generally "a disfavored remedy because they interrupt the ordinary process of judicial review and postpone relief for the prevailing party." *Dellums v. Smith*, 577 F. Supp. 1456, 1457 (N.D. Cal. 1984) (citation omitted), *rev'd on other grounds*, 797 F.2d 817 (9th Cir. 1986). Having carefully considered the factors that determine whether a court should grant a stay pending appeal, however, the Court concludes that just such a stay is warranted in this case. The potentially devastating economic effects on the Tribes in closing the casinos pursuant to this Court's July 12 order far outweigh any harm to the interests of the United States, the State or the public that would result during a stay of the judgment, particularly in light of the historical lack of enforcement of applicable state and federal gaming laws in this State and the role of prominent State officials in leading the Tribes to believe that Class III gaming would be allowed on Indian land within New Mexico. It is notable that neither the United States nor the State ever commenced an enforcement action against the gaming tribes. In fact, it is the Tribes that filed this action seeking a declaration of the law. Because the equities overwhelmingly favor granting a stay and because the Court recognizes that the Tribes' claims on appeal present difficult and unsettled questions of law,

the Court concludes that its judgment that Class III gaming activities are unlawful on Indian lands in New Mexico should be stayed pending appeal to the Tenth Circuit Court of Appeals.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Stay Judgment Pending Appeal, filed July 12, 1996 **[Doc. No. 182]** is **GRANTED**.

/s/ Martha Vazquez
UNITED STATES
DISTRICT JUDGE

25 U.S.C. § 2710

* * * *

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are –

(A) authorized by an ordinance or resolution that –

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that –

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any provision of this subsection –

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that –

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over –

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the

Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that –

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court –

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming

activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures –

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates –

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

(Pub.L. 100-497, § 11, Oct. 17, 1988, 102 Stat. 2472.)

STATE of New Mexico ex rel. Guy CLARK, Max Coll, and George Buffett, Petitioners,

v.

The Hon. Gary JOHNSON, Governor of the State of New Mexico, Respondent.

No. 22861.

Supreme Court of New Mexico.

July 13, 1995.

Victor R. Marshall & Associates, P.C., Victor R. Marshall, Alexis H. Johnson, Albuquerque, for petitioners.

Sutin, Thayer & Browne, P.C., Jonathan B. Sutin, Albuquerque, for respondent.

OPINION

MINZNER, Justice.

Petitioners filed a verified petition for writ of mandamus or writ of prohibition and declaratory judgment from this Court directed at Respondent, who is the Governor of the State of New Mexico. Attached to the petition was a copy of the "Compact and Revenue Sharing Agreement" entered into by the Governor of New Mexico with the Governor of Pojoaque Pueblo. The petition alleges that the Governor of New Mexico has entered into similar compacts and revenue-sharing agreements with the Presidents of the Jicarilla and Mescalero Apache Tribes, as well as the Governors of Acoma, Isleta, Nambe, Sandia, Santa Ana, Santa Clara, San Felipe, San Ildefonso, San

Juan, Taos, and Tesuque Pueblos pursuant to the Indian Gaming Regulatory Act (the Act or the IGRA). *See* 25 U.S.C.S. §§ 2701-2721 (Law.Co-op.Supp.1995).

Petitioners generally contend that the Governor of New Mexico lacked the authority to commit New Mexico to these compacts and agreements, because he attempted to exercise legislative authority contrary to the doctrine of separation of powers expressed in the state Constitution. *See* N.M. Const. art. III, § 1; *see also State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992) (per curiam) (*Finney I*). Petitioners sought an order that would preclude the Governor of New Mexico from implementing the compacts and revenue-sharing agreements he has signed. *Cf. State ex rel. Bird v. Apodaca*, 91 N.M. 279, 573 P.2d 213 (1977) (state highway engineer brought mandamus proceeding seeking an order directing the Governor to cease, desist, and refrain from removing or transferring petitioner or interfering with performance of his duties). This Court set the matter for hearing, *see* SCRA 1986, 12-504(C)(2) (Repl.Pamp.1992), but on motion of the Governor of New Mexico we vacated the original hearing date in order to give the Governor an opportunity to obtain counsel and to file a written response. After the Governor filed his response, Petitioners filed a brief, and the matter came before this Court for oral argument. Following oral argument, the matter was taken under advisement. *See* SCRA 12-504(C)(3)(d). Having determined that Petitioners' pleadings support an order granting a peremptory writ, we now grant that relief and explain our ruling. *See* SCRA 12-504(C)(3)(c).

BACKGROUND

Congress enacted the IGRA in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). In *Cabazon Band*, the Supreme Court upheld an Indian tribe's right to conduct bingo games free from interference by the State of California. *Id.* The *Cabazon Band* decision rested on the principle that Indian tribes are sovereign entities and that federal law limits the applicability of state and local law to tribal Indians on reservations. *Id.* at 207, 107 S.Ct. at 1087. The IGRA also recognized the sovereign right of tribes to regulate gaming activity on Indian lands. However, with the IGRA, Congress attempted to strike a balance between the rights of tribes as sovereigns and the interests that states may have in regulating sophisticated forms of gambling. *See* S.Rep. No. 446, 100th Cong., 2d Sess. 13 (1988).

The IGRA establishes three classes of gambling: Class I gaming, social or ceremonial games; Class II gaming, bingo and similar games; and Class III gaming, all other gambling, including pari-mutuel horse racing, casino gaming, and electronic versions of Class II games. *Id.* at 3. The IGRA provides for a system of joint regulation of Class II gaming by tribes and the federal government and a system for compacts between tribes and states for regulation of Class III gaming. *See id.* at 13. The IGRA establishes a National Indian Gaming Commission as an independent agency with a regulatory role for Class II gaming and an oversight role with respect to Class III gaming. 25 U.S.C.S. §§ 2704, 2706. Under the IGRA, Class III gaming is lawful on Indian lands only if such activities are located in a state that "permits such gaming for any

purpose by any person, organization, or entity, and [is] conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C.S. § 2710(d)(1).

The IGRA provides that an Indian tribe may request negotiations for a compact, and that upon receipt of such a request, a state must negotiate with the tribe in good faith. *See* 25 U.S.C.S. § 2710(d)(3)(A). If a state and a tribe fail after negotiation and then mediation to agree on a compact, the Secretary of the Interior is authorized to prescribe procedures that are consistent with the proposed compact selected by the mediator, the IGRA, and the laws of the state. *See* 25 U.S.C.S. § 2710(d)(7)(B)(vii)(I).

Litigation under the IGRA has resulted in a number of published opinions. These cases have arisen most frequently in federal court on suits brought by Indian tribes to compel negotiation. *See, e.g., Ponca Tribe of Oklahoma v. Oklahoma,* 37 F.3d 1422 (10th Cir.) (Indian tribes in New Mexico, Oklahoma, and Kansas sought injunctions requiring negotiation), *petition for cert. filed,* 63 U.S.L.W. 3477 (U.S. Dec. 9, 1994) (Nos. 94-1029 & 94-1030). In these cases, one issue has been the effect of the Tenth and Eleventh Amendments of the United States Constitution.

In *Ponca Tribe,* the Tenth Circuit affirmed district court decisions dismissing the tribes' suits against the Governors of Oklahoma and New Mexico. The Court of Appeals concluded that neither the Tenth nor the Eleventh Amendment barred the tribes' actions against the states, but determined that injunctive relief against the governors themselves was barred.

> In light of our Tenth Amendment analysis, IGRA does not require the states to regulate Class III gaming by entering into tribal-state compacts. Instead, the only obligation on the state is to negotiate in good faith. The act of negotiating, however, is the epitome of a discretionary act. How the state negotiates; what it perceives to be its interests that must be preserved; where, if anywhere, that it can compromise its interests – these all involve acts of discretion. Thus, injunctive relief against the governors is barred under *Ex parte Young* [, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)]. . . .
>
> Additionally, the tribes' suits against the Governors are in reality suits against the respective states and thus not authorized under the doctrine of *Ex parte Young*.

Id. at 1436 (citations omitted).

In November 1994, Respondent was elected Governor of New Mexico and formally assumed office on January 1, 1995. As part of his transition team, he appointed a negotiator to meet with various Indian tribal representatives to develop compacts and revenue-sharing agreements. The negotiations were successful. An affidavit by the Governor of San Felipe Pueblo, attached to the response of the Governor of New Mexico, indicates that the compact he signed was circulated in draft form to the media and members of the state legislature. The earliest of the compacts is dated February 13; the latest is dated March 1. The Governor of New Mexico's response to the petition also indicates that the Secretary of the Interior approved eleven of the compacts on March 22, 1995. The

petition was filed on April 20. Two additional compacts were approved effective May 15, 1995.

The compact with Pojoaque Pueblo is titled "A Compact Between the Pojoaque Pueblo and the State of New Mexico Providing for the Conduct of Class III Gaming." The Governor of New Mexico does not dispute that the compact and revenue sharing agreement with Pojoaque Pueblo are representative of the other compacts and agreements he signed. Because they are the only documents in the record, we will discuss them specifically, but also as illustrative of all the other compacts and agreements the Governor of New Mexico has signed.

The Recitals in the Compact include the following:

> WHEREAS, the State permits charitable organizations to conduct all forms of gaming wherein, for consideration, the participants are given an opportunity to win a prize, the award of which is determined by chance, including but not limited to all forms of casino-style games, and others, pursuant to § 30-19-6, NMSA 1978 (1994 Repl.Pamp.); and
>
> WHEREAS, the State also permits video pull-tabs and video bingo pursuant to §§ 60-2B-1 to -14, NMSA 1978 (1991 Repl.Pamp.), *Infinity Group, Inc. v. Manzagol*, 118 N.M. 632, 884 P.2d 523 (1994); and
>
> WHEREAS, the State permits pari-mutuel wagering pursuant to § 60-1-1 to -26, NMSA 1978 (1991 Repl.Pamp.) and §§ 60-2D-1 to -18, NMSA 1978 (1991 Repl.Pamp.); and
>
> WHEREAS, such forms of Class III Gaming are, therefore, permitted in the State within the

meaning of the IGRA, 25 U.S.C. § 2710(d)(1)(B); and

. . . .

WHEREAS, a Compact between the Tribe and the State for the conduct of Class III Gaming on Indian Lands will satisfy the State's obligation to comply with federal law and fulfill the IGRA requirement for the lawful operation of Class III Gaming on the Indian Lands in New Mexico. . . .

The compact further provides as follows:

The Tribe may conduct, only on Indian Lands, subject to all of the terms and conditions of this Compact, any or all Class III Gaming, that, as of the date this Compact is signed by the Governor of the State is permitted within the State for any purpose by any person, organization or entity, such as is set forth in the Recitals to this Compact[.]

Other recitals describe the Governor's power to enter into the compact under the IGRA. They are:

WHEREAS, the Joint Powers Agreements Act, §§ 11-1-1 to -7, NMSA 1978 (1994 Repl.Pamp.), authorizes any two or more public agencies by agreement to jointly exercise any power common to the contracting parties (§ 11-1-3), and defined "public agency" to include Indian tribes and the State of New Mexico or any department or agency thereof (§ 11-1-2(A)); and

WHEREAS, the Mutual Aid Act, §§ 29-8-1 to -3, NMSA 1978 (1994 Repl.Pamp.), authorizes the State and any Indian tribe to enter into

> mutual aid agreements with respect to law enforcement; and
>
> WHEREAS, Article V, § 4 of the Constitution of the State of New Mexico provides that "The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed."

These recitals indicate that in entering the compact, both the State and Tribal Governors believed that the Governor of New Mexico was authorized to bind the State of New Mexico with his signature. In challenging the Governor's actions, Petitioners have relied on the Kansas Supreme Court per curiam decision in *Finney I*. There the Kansas Supreme Court held that:

> [M]any of the provisions in the compact would operate as the enactment of new laws and the amendment of existing laws. The Kansas Constitution grants such power exclusively to the legislative branch of government . . . we conclude the Governor had the authority to enter into negotiations with the Kickapoo Nation, but, in the absence of an appropriate delegation of power by the Kansas Legislature or legislative approval of the compact, the Governor has no power to bind the State to the terms thereof.

Id., 836 P.2d at 1185. For the reasons that follow, we conclude that New Mexico law is similar.

MANDAMUS

We initially consider whether, in light of the procedural posture of this case, a writ of mandamus is an

appropriate remedy. Specifically, we examine three sub-issues: (1) whether Petitioners have standing to bring this action; (2) whether this action is properly before this Court in an original proceeding; and (3) whether a prohibitive writ of mandamus will issue to enjoin a state official from acting or whether it will only issue to compel an official to act.

In the case of *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 524 P.2d 975 (1974), a state senator sought a writ of mandamus to compel the Governor and other officials to treat as void certain partial vetoes. In considering the petitioner's standing to bring that action, we said:

> [I]t has been clearly and firmly established that even though a private party may not have standing to invoke the power of this Court to resolve constitutional questions and enforce constitutional compliance, this Court, in its discretion, may grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance.

Id. at 363, 524 P.2d at 979. Accordingly, we did not need to consider whether the petitioner's status as a legislator, taxpayer, or citizen conferred standing in that case. In the present proceeding, two of the Petitioners are state legislators, and all three are voters and taxpayers. However, as in *Sego*, we need not consider whether those factors independently confer standing to bring this action because, as in *Sego*, the issues presented are of "great public interest and importance." *Id.* Petitioners assert in the present proceeding that the Governor has exercised the state legislature's authority. Their assertion presents issues of constitutional and fundamental importance; in

resolving those issues, we will contribute to this State's definition of itself as sovereign. "We simply elect to confer standing on the basis of the importance of the public issues involved." *Id.* More limited notions of standing are not acceptable. *See id.; Hutcheson v. Gonzales*, 41 N.M. 474, 491-94, 71 P.2d 140, 151-52 (1937); *see generally* Charles T. DuMars & Michael B. Browde, *Mandamus in New Mexico*, 4 N.M.L.Rev. 155, 170-72 (1974). We conclude that Petitioners have standing.

We next consider whether this case should more properly be brought in district court or whether it is properly before this Court in an original proceeding. Our state Constitution provides that this Court will "have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions." N.M. Const. art. VI, § 3. In seeming contradiction, NMSA 1978, Section 44-2-3 conveys upon the district court "exclusive original jurisdiction in all cases of mandamus." However, as one scholarly commentary has noted, this apparent conflict:

> has never given rise to difficulty since the supreme court, irrespective of the statute, has regularly exercised original jurisdiction . . . [and SCRA 12-504(B)(1)(b)] has given force and effect to the policy behind the statute, by requiring that an original petition which could have been brought in a lower court must set forth "the circumstances necessary or proper to seek the writ in the supreme court."

DuMars & Browde, *supra*, at 157 (quoting the predecessor to SCRA 1986, 12-504) (footnotes omitted). Such "circumstances" which justify bringing an original mandamus

proceeding in this Court include "the possible inadequacy of other remedies and the necessity of an early decision on this question of great public importance." *Thompson v. Legislative Audit Comm'n*, 79 N.M. 693, 694-95, 448 P.2d 799, 800-01 (1968).

As we have said, this proceeding implicates fundamental constitutional questions of great public importance. Moreover, an early resolution of this dispute is desirable. The Governor asserts, and it has not been disputed, that several of the compacting tribes are in the process of establishing and building gambling resorts and casinos. These projects entail the investment of large sums of tribal money. Capital financing for these projects may well depend upon resolution of the issue presented in this case. Moreover, the relevant facts are virtually undisputed, we perceive no additional factual questions that could be or should be answered in the district court, and the purely legal issues presented would have come eventually to this Court even if proceedings had been initiated in the district court. Accordingly, we conclude that the exercise of our original constitutional jurisdiction is appropriate in this case.

The final procedural issue is whether mandamus, which normally lies to compel a government official to perform a non-discretionary act, is a proper remedy by which to enjoin the Governor from acting unconstitutionally. This Court has never "insisted upon . . . a technical approach [to the application of mandamus] where there is involved a question of great public import," *Thompson*, 79 N.M. at 694, 448 P.2d at 800, and where other remedies might be inadequate to address that question.

Prohibitory mandamus may well have been a part of New Mexico jurisprudence even before statehood. One nineteenth century New Mexico judge characterized the authority to prohibit unlawful official conduct as implicit in the nature of mandamus. In the case of *In re Sloan*, 5 N.M. 590, 25 P. 930 (1891), the district court enjoined a board of county commissioners from certifying certain candidates as winners of a contested election and ordered the board to instead certify other candidates. The Territorial Supreme Court upheld the district court's granting of both a writ of mandamus and injunctive relief. Justice Freeman wrote: "It is well settled that the two processes, mandamus and injunction, are correlative in their character and operation. As a rule, whenever a court will interpose by mandamus to compel the performance of a duty, it will exercise its restraining power to prevent a corresponding violation of duty." *Id.* at 628, 25 P. at 942 (Freeman, J., concurring). More recent cases illustrate Justice Freeman's insight. This Court on several occasions has recognized that mandamus is an appropriate means to prohibit unlawful or unconstitutional official action. *See Stanley v. Raton Bd. of Educ.*, 117 N.M. 717, 718, 876 P.2d 232, 233 (1994); *State ex rel. Bird*, 91 N.M. at 282, 573 P.2d at 216; *State ex rel. Sego*, 86 N.M. at 363, 524 P.2d at 979; *State ex rel. State Bd. of Educ. v. Montoya*, 73 N.M. 162, 170, 386 P.2d 252, 258 (1963); *cf. McFadden v. Jordan*, 32 Cal.2d 330, 196 P.2d 787 (1948) (en banc) (issuing writ of mandamus to enjoin the secretary of state from submitting to the voters unconstitutional initiative proposal), *cert. denied*, 336 U.S. 918, 69 S.Ct. 640, 93 L.Ed. 1080 (1949); *Leininger v. Alger*, 316 Mich. 644, 26 N.W.2d 348 (1947) (same); Iowa Code § 661.1 (1995) (defining mandamus as

either mandatory or prohibitory). "Mandamus would necessarily lie if the Governor's actions were unconstitutional. . . . " *State ex rel. Bird*, 91 N.M. at 288, 573 P.2d at 222 (Sosa, J., dissenting) (distinguishing *Sego* as involving an unconstitutional use of the Governor's veto power).

As the United States Supreme Court has observed, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 944, 103 S.Ct. 2764, 2781, 77 L.Ed.2d 317 (1983). Although it is not within the province of this Court to evaluate the wisdom of an act of either the legislature or the Governor, it certainly is our role to determine whether that act goes beyond the bounds established by our state Constitution. As we said in *State ex rel. Hovey Concrete Products Co. v. Mechem*, 63 N.M. 250, 252, 316 P.2d 1069, 1070 (1957), *overruled on other grounds by Wylie Corp. v. Mowrer*, 104 N.M. 751, 726 P.2d 1381 (1986):

> [D]eeply rooted in American Jurisprudence is the doctrine that state constitutions are not grants of power to the legislative, to the executive and to the judiciary, but are limitations on the powers of each. No branch of the state may add to, nor detract from its clear mandate. It is a function of the judiciary when its jurisdiction is properly invoked to measure the acts of the executive and the legislative branch solely by the yardstick of the constitution.

We conclude that Petitioners' arguments raise allegations that support the use of prohibitory mandamus.

INDISPENSABLE PARTIES

The Governor has argued that the Tribes and Pueblos with whom he signed the compacts and agreements are indispensable parties to this proceeding. We disagree. In a mandamus case, a party is indispensable if the "performance of an act [to be compelled by the writ of mandamus is] dependent on the will of a third party, not before the court." *Chavez v. Baca*, 47 N.M. 471, 482, 144 P.2d 175, 182 (1943). That is not the case here. Petitioners seek a writ of mandamus against the Governor of New Mexico, not against any of the tribal officials. Resolution of this case requires only that we evaluate the Governor's authority under New Mexico law to enter into the compacts and agreements absent legislative authorization or ratification. Such authority cannot derive from the compact and agreement; it must derive from state law. This is not an action based on breach of contract, and its resolution does not require us to adjudicate the rights and obligations of the respective parties to the compact.

GAMBLING IN NEW MEXICO AND 25 U.S.C.S. § 2710(d)(1)(B)

As an alternative to their argument that the Governor lacked authority to enter into the compact, Petitioners assert that the disputed compact violates limitations in the IGRA on the permissible scope of any gaming compact. We address this argument first because an analysis of New Mexico's gambling laws, and the public policies expressed therein, is relevant to the question of whether the Governor has infringed legislative authority in signing the compacts.

Under the IGRA, Class III gaming activities are lawful on Indian lands only if such activities are conducted pursuant to a tribal-state compact and are "located in a State that permits *such gaming* for any purpose by any person, organization, or entity." 25 U.S.C.S. § 2710(d)(1)(B) (emphasis added). The Eighth and Ninth Circuits have interpreted "such gaming" to mean only those forms of gaming a state presently permits. *See Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 421, 426 (9th Cir.1994); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 279 (8th Cir.1993). For example, in *Rumsey Indian Rancheria*, the Ninth Circuit Court of Appeals held that the IGRA does not require the state to negotiate regarding one form of Class III gaming activity because the state had legalized another, albeit similar form of gaming. A federal district court made a similar determination. *See Coeur D'Alene Tribe v. Idaho*, 842 F.Supp. 1268 (D.Idaho 1994), *aff'd*, 51 F.3d 876 (9th Cir.1995).

Petitioners argue that Section 2710(d)(1)(B) is not satisfied because the compact authorizes all forms of "casino-style" gaming. Although not stated in the compact, we assume this might include such games as blackjack and poker in all its forms, keno, baccarat, craps, roulette, or any other form of gambling wherein the award of a prize is determined by some combination of chance or skill. The Governor states that New Mexico permits charities to conduct all forms of gaming, including "casino-style" gaming, under the provisions of the permissive lottery exception to New Mexico's gambling laws. *See* NMSA 1978, § 30-19-6 (Repl.Pamp.1994).

The question raised by Petitioners' argument is what forms of Class III gaming New Mexico "permits" within the meaning of 25 U.S.C.S. § 2710(d)(1)(B). This is ultimately a federal question. *See State of Kansas ex rel. Stephan v. Finney*, No. 93-4098-SAC, 1993 WL 192809 at *5 (D.Kan. May 12, 1993) (unpublished opinion). Nevertheless, it depends on an interpretation of New Mexico's gambling laws. *See State ex rel. Stephan v. Finney*, 254 Kan. 632, 867 P.2d 1034, 1038 (1994) (*Finney II*) (Kansas Supreme Court is proper forum to interpret use of term "lottery" in state constitution).

We do not agree with the Governor's broad assertion that any and all forms of "casino-style" gaming, such as the ones we have described, would be allowed under Section 30-19-6. This provision allows charitable and other non-profit organizations to operate a "lottery" twice a year, and requires that the revenue derived be used for the benefit of the organization or for public purposes. *Id.* Neither this Court nor the Court of Appeals has construed this provision in order to decide specifically what forms of gaming or gambling the legislature may have intended to allow under this provision, and we will not undertake the task of attempting to catalogue those games now. This question has not been specifically addressed by the parties, and indeed its resolution is unnecessary to our decision in this case.

It is true, as the Governor has asserted, that the statutory definition of a "lottery" in Article 19, Section 30 of the Criminal Code is extremely broad. "Lottery" is defined in the Criminal Code as "an enterprise wherein, for a consideration, the participants are given an opportunity to win a prize, the award of which is determined

by chance, even though accompanied by some skill." NMSA 1978, § 30-19-1(C) (Repl.Pamp.1994). However, Section 30-19-6(D) states that "nothing" in Article 19, Chapter 30 of the Criminal Code applies to any "lottery" operated by tax exempt organizations. In addition, the exception to hold a lottery for charitable purposes would in no way exempt the organization involved from other prohibitions against gambling in the Criminal Code. The general criminal prohibition against gambling in NMSA 1978, Section 30-19-2 (Repl.Pamp.1994), is applicable to both "making a bet" and participating in or conducting a lottery. Like the term "lottery," the term "bet" is also defined broadly as it relates to gambling. The term "bet" is defined as "a bargain in which the parties agree that, dependent upon chance, even though accompanied by some skill, one stands to win or lose anything of value specified in the agreement." Section 30-19-1(B).

We think that most of the forms of "casino-style" games we have described could just as easily fall within the definition and prohibition against "betting" as within the broad definition of "lottery." The question, as we see it, would be whether that form of gaming or gambling is more like "making a bet" or conducting or participating in a "lottery." If it was the former, the activity would still be illegal in all circumstances despite the effect of the permissive lottery statute.[1]

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[1] The legislature appears to have intended to make these two categories, betting versus lotteries, mutually exclusive; a lottery is specifically excluded from the definition of betting. *See* § 30-19-1(B)(3). Thus, a particular form of gaming or gambling would necessarily fall under one or the other of these definitions. In most cases involving the prosecution of illegal

Moreover, we think the term "lottery" as used in Section 30-19-6 should not receive an expansive definition and should be narrowly construed. New Mexico law has unequivocally declared that all for-profit gambling is illegal and prohibited, except for licensed pari-mutuel horse racing. *See* NMSA 1978, § 30-19-3 (Repl.Pamp.1994); NMSA 1978, § 60-1-10 (Repl.Pamp.1991). New Mexico has expressed a strong public policy against for-profit gambling by criminalizing all such gambling with the exception of licensed pari-mutuel horse racing. *See* § 30-19-3. The permissive lotteries allowed by Section 30-19-6 include church fair drawings, movie theater prize drawings, and county fair livestock prizes, as well as the twice-a-year provision for nonprofit organizations on which the Governor's argument depends. We think that any expansive construction of the term "lottery" in Section 30-19-6 that would authorize any of these organizations to engage in a full range of "casino-style" gaming would be contrary to the legislature's general public policy against gambling. We note that the Court of Appeals for similar reasons has rejected a broad definition of "raffles" under the Bingo and Raffle Act, NMSA 1978, §§ 60-2B-1 to -14 (Repl.Pamp.1991). *State ex rel. Rodriguez v. American Legion Post No. 99*, 106 N.M. 784, 786-88, 750

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gambling whether the activity was considered "making a bet" or participating in a "lottery" would be unimportant; both represent criminal activity, and they are treated equally under the law. *See* NMSA 1978, §§ 30-19-2 & -3 (Repl.Pamp.1994). However, in attempting to categorize what form of gaming was allowable under the permissive lottery exception we would be required to decide whether a particular form of gaming fell into one category or the other.

P.2d 1110, 1112-14 (Ct.App.), *cert. denied*, 106 N.M. 588, 746 P.2d 1120 (1987), *and cert. denied*, 107 N.M. 16, 751 P.2d 700 (1988); *see also American Legion Post No. 49 v. Hughes*, 120 N.M. 255, 259-60, 901 P.2d 186, 190-91 (Ct.App.1994) (rejecting broad construction of "game of chance" under the Bingo and Raffle Act), *cert. granted*, 119 N.M. 389, 890 P.2d 1321 (1995).

We have no doubt that the compact and agreement authorizes more forms of gaming than New Mexico law permits under any set of circumstances. We need not decide which forms New Mexico permits. The legislature of this State has unequivocally expressed a public policy against unrestricted gaming, and the Governor has taken a course contrary to that expressed policy. That fact is relevant in evaluating his authority to enter into the compacts and revenue-sharing agreements. Further, even if our laws allowed under some circumstances what the compact terms "casino-style" gaming, we conclude that the Governor of New Mexico negotiated and executed a tribal-state compact that exceeded his authority as chief executive officer. To reach this conclusion, we first consider the separation of powers doctrine and then consider the general nature of the Pojoaque compact as representative of all of the compacts the Governor of New Mexico signed.

SEPARATION OF POWERS UNDER THE NEW MEXICO CONSTITUTION

The New Mexico Constitution vests the legislative power in the legislature, N.M. Const. art. IV, § 1, and the executive power in the governor and six other elected

officials, *id.* art. V, § 1. The Constitution also explicitly provides for the separation of governmental powers:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted. . . .

N.M. Const. art. III, § 1. This provision reflects a principle that is fundamental in the structure of the federal government and the governments of all fifty states. The doctrine of separation of powers rests on the notion that the accumulation of too much power in one governmental entity presents a threat to liberty. *See Gregory v. Ashcroft*, 501 U.S. 452, 459, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991). James Madison expressed this sentiment more than two hundred years ago when he wrote, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." 1 Alexander Hamilton, James Madison & John Jay, *The Federalist, A Commentary on the Constitution of the United States* No. XLVII, at 329 (1901 ed.).

Despite the strict language of Article III, Section 1, this Court has previously said that "[t]he constitutional doctrine of separation of powers allows some overlap in the exercise of governmental function." *Mowrer v. Rusk*, 95 N.M. 48, 53, 618 P.2d 886, 891 (1980). This common

sense approach recognizes that the absolute separation of governmental functions is neither desirable nor realistic. As one state court has said, separation of powers doctrine "does not mean an absolute separation of functions; for, if it did, it would really mean that we are to have no government." *Sabre v. Rutland R. Co.*, 86 Vt. 347, 85 A. 693, 699 (1913). Recognizing, as a practical matter, that there cannot be absolute compartmentalization of the legislative, executive, and judicial functions among the respective branches, we must nevertheless give effect to Article III, Section 1. Accordingly, we have not been reluctant to intervene when one branch of government unduly "interfere[d] with or encroach[ed] on the authority or within the province of" a coordinate branch of government. *Mowrer*, 95 N.M. at 54, 618 P.2d at 892 (quoting *Smith v. Miller*, 153 Colo. 35, 384 P.2d 738, 741 (1963)).

This Court has previously held that Article III, Section 1 mandates that it is the Legislature that creates the law, and the Governor's proper role is the execution of the laws. *State v. Fifth Judicial Dist. Court*, 36 N.M. 151, 153, 9 P.2d 691, 692 (1932); *see also State v. Armstrong*, 31 N.M. 220, 255, 243 P. 333, 347 (1924) (recognizing that the Legislature has "the sole power of enacting law"). Our task, then, is to classify the Governor's actions in entering into the gaming compacts. Although the executive, legislative, and judicial powers are not " 'hermetically' sealed," they are nonetheless "functionally identifiable" one from another. *Chadha*, 462 U.S. at 951, 103 S.Ct. at 2784. If the entry into the compacts reasonably can be viewed as the execution of law, we would have no difficulty recognizing the attempt as within the Governor's authority as the State's chief executive officer. If, on the

other hand, his actions in fact conflict with or infringe upon what is the essence of legislative authority – the making of law – then the Governor has exceeded his authority.

APPLICATION OF THE DOCTRINE OF SEPARATION OF POWERS TO THE COMPACT WITH POJOAQUE PUEBLO

The Governor may not exercise power that as a matter of state constitutional law infringes on the power properly belonging to the legislature. We have no doubt that the compact with Pojoaque Pueblo does not execute existing New Mexico statutory or case law, but that it is instead an attempt to create new law. *Cf. Texas v. New Mexico*, 462 U.S. 554, 564, 103 S.Ct. 2558, 2565, 77 L.Ed.2d 1 (1983) (holding that, upon approval by Congress, a compact between states becomes federal law that binds the states); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28, 71 S.Ct. 557, 560-561, 95 L.Ed. 713 (1951) (characterizing an interstate compact as a "legislative means" by which states resolve interstate dispute). However, that in itself is not dispositive. The test is whether the Governor's action disrupts the proper balance between the executive and legislative branches. *See Board of Educ. v. Harrell*, 118 N.M. 470, 484, 882 P.2d 511, 525 (1994). In *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 443, 97 S.Ct. 2777, 2790, 53 L.Ed.2d 867 (1977), the United States Supreme Court said:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which [the action by one branch prevents another branch] from accomplishing its

> constitutionally assigned functions. *United States v. Nixon*, 418 U.S. at 711-12 [94 S.Ct. at 3109-10]. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress. *Ibid.*

Id. (citation omitted). One mark of undue disruption would be an attempt to foreclose legislative action in areas where legislative authority is undisputed. The Governor's present authority could not preclude future legislative action, and he could not execute an agreement that foreclosed inconsistent legislative action or precluded the application of such legislation to the agreement. The compact with Pojoaque Pueblo and those of which it is representative cannot be said to be consistent with these principles.

The terms of the compact with Pojoaque Pueblo give the Tribe a virtually irrevocable and seemingly perpetual right to conduct any form of Class III gaming permitted in New Mexico on the date the Governor signed the agreement. *See* Compact Between the Pojoaque Pueblo and the State of New Mexico, at 4. Arguably, even legislative change could not affect the Tribe's ability to conduct Class III gaming authorized under the original compact. The compact is binding on the State of New Mexico for fifteen years, and it is automatically renewed for additional five-year periods unless it has been terminated by mutual agreement. *Id.* at 27. Any action by the State to amend or repeal its laws that had the effect of restricting the scope of Indian gaming, or even the attempt to directly or indirectly restrict the scope of such gaming,

terminates the Tribe's obligation to make payments to the State of New Mexico under the revenue-sharing agreement separately entered into between the Governor and Pojoaque Pueblo. *See* Tribal-State Revenue Sharing Agreement, ¶ 5(A).[2]

We also find the Governor's action to be disruptive of legislative authority because the compact strikes a detailed and specific balance between the respective roles of the State and the Tribe in such important matters as the regulation of Class III gaming activities, the licensing of its operators, and the respective civil and criminal jurisdictions of the State and the Tribe necessary for the enforcement of state or tribal laws or regulations. All of this has occurred in the absence of *any* action on the part of the legislature. While negotiations between states and Indian tribes to address these matters is expressly contemplated under the IGRA, *see* 25 U.S.C.S. § 2710(d)(3)(C), we think the actual balance that is struck represents a legislative function. While the legislature might authorize the Governor to enter into a gaming compact or ratify his actions with respect to a compact he has negotiated, the Governor cannot enter into such a compact solely on his own authority.

Moreover, it is undisputed that New Mexico's legislature possesses the authority to prohibit or regulate all aspects of gambling on non-Indian lands. Pursuant to this authority, our legislature has, with narrow exceptions,

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[2] Under this agreement, three to five percent of the "net win" derived from Class III gaming on the Pojoaque Pueblo would be paid to the State of New Mexico and divided between state and local government.

made for-profit gambling a felony, and thereby expressed a general repugnance to this activity. Section 30-19-3. Whether or not the legislature, if given an opportunity to address the issue of the various gaming compacts, would favor a more restrictive approach consistent with its actions in the past constitutes a legislative policy decision. The compact signed by the Governor, on the other hand, authorizes Pojoaque Pueblo to conduct "all forms of casino-style games"; that is, virtually any form of commercial gambling. By entering into such a permissive compact with Pojoaque Pueblo and other Indian leaders, we think that the Governor contravened the legislature's expressed aversion to commercial gambling and exceeded his authority as this State's chief executive officer.

Our conclusion that the Governor lacks authority to enter into the disputed compacts gains support from Justice Robert H. Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-55, 72 S.Ct. 863, 869-80, 96 L.Ed. 1153 (1952). In that case, the Supreme Court faced the issue of whether President Truman had exceeded his constitutional authority by issuing an executive order directing the Secretary of Commerce to assume control of a number of steel mills. The President issued this order during the Korean War when the mills became incapacitated by a labor dispute. President Truman justified the seizure on the grounds that (1) he was the commander in chief of the armed forces, and (2) various statutes gave the President special emergency war powers. The Court struck down the President's action, holding that it was beyond the scope of Presidential authority. *Id.* at 589, 72 S.Ct. at 867-68. Noting that the

seizure was contrary to the will of Congress, Justice Jackson wrote in a famous concurring opinion:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting on the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 637-38, 72 S.Ct. at 871 (Jackson, J., concurring) (footnote omitted).

Since 1923, the State of New Mexico has entered into at least twenty-two different compacts with other sovereign entities, including the United States and other states.[3] These agreements encompass such widely diverse governmental purposes as interstate water usage and cooperation on higher education. In every case, New Mexico entered into the compact with the enactment of a statute by the legislature. Apart from non-discretionary ministerial duties,[4] the Governor's role in the compact

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[3] Appendix A includes a listing of these compacts.

[4] For example, the legislation whereby New Mexico entered into an interstate compact regarding parole and probation provided: "The Governor of this state is hereby authorized and directed to execute a compact on behalf of the State of New Mexico . . . in the form substantially as follows. . . . " 1937 N.M.Laws ch. 10, § 1.

approval process has heretofore been limited to approving or vetoing[5] the legislation that approves the compact. This is the Governor's role with respect to all legislation passed by the legislature. *See* N.M. Const. art. IV, § 22.

Residual governmental authority should rest with the legislative branch rather than the executive branch. The state legislature, directly representative of the people, has broad plenary powers. If a state constitution is silent on a particular issue, the legislature should be the body of government to address the issue. *See Clinton v. Clinton*, 305 Ark. 585, 810 S.W.2d 923, 926 (1991). *Cf. Fair Sch. Fin. Council v. State*, 746 P.2d 1135, 1149 (Okla.1987) (under state constitution, a legislature may generally do "all but that which it is prohibited from doing"); *State ex inf. Danforth v. Merrell*, 530 S.W.2d 209, 213 (Mo.1975) (en banc) (state legislature "has the power to enact any law not prohibited by the constitution"); *House Speaker v. Governor*, 195 Mich.App. 376, 491 N.W.2d 832, 839 (1992) ("Any legislative power that the Governor possesses must be expressly granted to him by the constitution."). We conclude that the Governor lacked authority under the state Constitution to bind the State by unilaterally entering into the compacts and revenue-sharing agreements in question.

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[5] The Governor of New Mexico has vetoed at least one interstate compact. In 1925, the governor vetoed the Pecos River Compact after it had been approved by the legislatures of Texas and New Mexico. *See* Letter from A.T. Hannett, Governor, to the New Mexico Senate (March 14, 1925) (reprinted in *Senate Journal of the Seventh Legislature* 423 (1925)).

NEW MEXICO STATUTORY AUTHORITY

In *Willis v. Fordice*, 850 F.Supp. 523 (S.D.Miss.1994), *aff'd*, 55 F.3d 633 (1995) (No. 94-60299), the court upheld the governor's authority to enter into a gaming compact. There, however, the court specifically relied on a Mississippi statute that provides the governor with authority to transact " 'all the business of the state . . . with any other state or territory.' " *Id.* at 532 (quoting Miss.Code Ann. § 7-1-13 (1972)). New Mexico has no such statute. In fact, in this case the Governor relies primarily on Article V, Section 4 of the New Mexico Constitution, which provides only that the governor shall *execute* the laws. To the extent that the Governor does rely on statutory authority, his reliance is misplaced.

An analysis of the Joint Powers Agreement Act, NMSA 1978, §§ 11-1-1 to -7 (Repl.Pamp.1994), indicates that that statute does not enlarge the Governor's authority in the manner that he urges. That statute authorizes "public agencies" to enter into "agreements" with other public agencies. *Id.* § 11-1-3. The statute defines a "public agency" as "the federal government or any federal department or agency, this state, an adjoining state or any state department or agency, an Indian tribe or pueblo, a county, municipality, public corporation or public district of this state or . . . any school district. . . . " *Id.* § 11-1-2(A). The Governor's claim of authority seems to be premised upon the notion that he is a "state department or agency" within the meaning of this statute.[6] This claim is

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[6] The list includes neither the Governor nor executive officers. Application of the principle of *expressio unius est exclusio alterius* supports the conclusion that the framers of this

untenable. To be sure, the Joint Powers Agreement Act does authorize an agreement between the State and a sovereign Indian tribe. However, the statute expressly requires that such an agreement must be "authorized by [the public agency's] legislative or other governing bod[y]." *Id.* § 11-1-3. This language plainly mandates that the legislature must approve any agreement to which the State is a party. The statute expressly disclaims any enlargement of the authority of public agencies when it provides that agreements executed thereunder are "subject to any constitutional or legislative restriction imposed upon any of the contracting public agencies." *Id.* § 11-1-2(B). We conclude that the Joint Powers Agreement Act does not provide authority for the compacts and revenue-sharing agreements at issue.

Likewise, the Mutual Aid Act, NMSA 1978, §§ 29-8-1 to -3 (Repl.Pamp.1994), does not provide authority for the compacts and revenue-sharing agreements. That statute does authorize tribal-state agreements; however, the scope of the statute is confined to "agreements . . . with respect to law enforcement." *Id.* § 29-8-3. It is true that the compacts have some provisions regarding law enforcement, but this fact does not bring all of the terms within the scope of the Mutual Aid Act. The authority of an executive acting pursuant to a legislative grant of authority is limited to the express or implied terms of that grant. *See Worthington v. Fauver*, 88 N.J. 183, 440 A.2d 1128, 1140 (1982). *Cf. Rivas v. Board of Cosmetologists*, 101 N.M. 592,

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statute did not intend to include the Governor as a "public agency." *See Bettini v. City of Las Cruces*, 82 N.M. 633, 635, 485 P.2d 967, 969 (1971).

593, 686 P.2d 934, 935 (1984) (an executive agency cannot promulgate a regulation that is beyond the scope of its statutory authority); *State ex rel. Lee v. Hartman*, 69 N.M. 419, 426, 367 P.2d 918, 923 (1961) (holding that a delegation of authority by the legislature must be express and provide clear statutory standards to guide the delegee). The Mutual Aid Act does not in any way pertain to gaming compacts and provides no statutory basis for the compact with Pojoaque Pueblo.

APPLICABILITY OF FEDERAL LAW

The Governor argues that even if he lacked the authority under state law to enter into the compact, it is nonetheless binding upon the State of New Mexico as a matter of federal law. Along these same lines, he also argues that he possesses the authority, as a matter of *federal law*, to bind the State to the terms of the compact, irrespective of whether he has the authority as a matter of state law. We find the Governor's argument on these points to be inconsistent with core principles of federalism. The Governor has only such authority as is given to him by our state Constitution and statutes enacted pursuant to it. *Cf. Rapp v. Carey*, 44 N.Y.2d 157, 404 N.Y.S.2d 565, 375 N.E.2d 745, 750 (1978) (holding that the governor of New York "has only those powers delegated to him by the [state] Constitution and the statutes"). We do not agree that Congress, in enacting the IGRA, sought to invest state governors with powers in excess of those that the governors possess under state law. Moreover, we are confident that the United States Supreme Court would reject any such attempt by Congress to enlarge state gubernatorial power. *Cf. Gregory*, 501 U.S. at 460, 111 S.Ct.

at 2400 (recognizing that "[t]hrough the structure of its government . . . a State defines itself as a sovereign"); *New York v. United States*, 505 U.S. 144, 176, 112 S.Ct. 2408, 2428, 120 L.Ed.2d 120 (1992) (striking down an act of Congress on the ground that principles of federalism will not permit Congress to " 'commandeer[ ] the legislative processes of the States' " by directly compelling the states to act (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288, 101 S.Ct. 2352, 2366, 69 L.Ed.2d 1 (1981))); *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (striking down federal school gun ban on the ground that it is not substantially related to interstate commerce, and therefore unconstitutionally usurps state sovereignty).

We entertain no doubts that Congress could, if it so desired, enact legislation legalizing all forms of gambling on all Indian lands in whatever state they may occur. *See Morton v. Mancari*, 417 U.S. 535, 551-52, 94 S.Ct. 2474, 2483-84, 41 L.Ed.2d 290 (1974). That is, however, not the course that Congress chose. Rather, Congress sought to give the states a role in the process. *See* S.Rep. No. 446, 100th Cong., 2d Sess. 13. It did so by permitting Class III gaming only on those Indian lands where a negotiated compact is in effect between the state and the tribe. 25 U.S.C.S. § 2710(d)(1)(C). To this end, the language of the IGRA provides that "Any State . . . may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian Tribe." *Id.* § 2710(d)(3)(B). The only reasonable interpretation of this language is that it authorizes state officials, acting pursuant to their authority held under state law, to enter into gaming compacts

on behalf of the state. It follows that because the Governor lacked authority under New Mexico law to enter into the compact with Pojoaque Pueblo, the State of New Mexico has not yet entered into any gaming compact that the Governor may implement. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-79, 2 L.Ed. 60 (1803) (holding that an unconstitutional act of Congress has no legal effect).

CONCLUSION

Under federal law as expressed in the IGRA, Class III gaming activities are lawful on Indian land only if the State permits such gaming "for any purpose by any person, organization, or entity." The compacts negotiated and signed by the Governor authorize gaming that New Mexico law does not permit. For example, New Mexico law does not permit "all forms of casino-style games" as stated in the recitals in the compact with Pojoaque Pueblo.

In addition, the New Mexico Constitution requires legislative approval or ratification of compacts that are otherwise in conflict with state gambling statutes. Under state constitutional separation of powers, the Governor may neither infringe upon legislative authority with respect to existing law nor with respect to the power of the legislature to change law in the future. Residual governmental power rests within the legislature. The specific enabling legislation on which the Governor relies is not applicable.

The IGRA does not purport to expand state gubernatorial power. The Governor's power to negotiate and

sign the compacts derives from the state constitution and state statutes.

Based on our interpretation of state gambling laws as making casino-style gaming illegal, state constitutional law as limiting the authority of the executive branch, and the IGRA as not purporting to expand state gubernatorial power, we conclude that the compacts executed by the Governor are without legal effect and that no gaming compacts exist between the Tribes and Pueblos and the State of New Mexico. Thus New Mexico has not entered into any gaming compact that either the Governor or any other state official may implement.

For these reasons we now issue the peremptory writ and stay. We stay all actions to enforce, implement, or enable any and all of the gaming compacts and revenue-sharing agreements executed by the Governor, and we direct the Governor and all other state officials subject to his authority to proceed in conformity with the views of this Court expressed herein concerning (1) the legality of casino-style gaming; (2) the limitations imposed on the executive branch by Article III, Section 1 of the New Mexico Constitution; and (3) the compacts' lack of legal effect.

IT IS SO ORDERED.

BACA, C.J., RAMSOM and FRANCHINI, JJ., and DONNELLY, J., court of appeals, sitting by designation, concur.

APPENDIX A: INTERSTATE COMPACTS

1. 1923 N.M.Laws, ch. 6, § 1 (now codified at NMSA 1978, § 72-15-5 (Repl.Pamp.1985)). Colorado River Compact.

2. 1923 N.M.Laws, ch. 7, § 1 (now codified at NMSA 1978, § 72-15-16 (Repl.Pamp.1985)). La Plata River Compact.

3. 1933 N.M.Laws, ch. 166 (now codified at NMSA 1978, § 72-15-19 (Repl.Pamp.1985)). Pecos River Compact. (*See Texas v. New Mexico*, 462 U.S. 554 (1983)).

4. 1937 N.M.Laws, ch. 10, § 1 (now codified at NMSA 1978, § 31-5-1 (Repl.Pamp.1984)). Compact Relating to Convicts on Probation or Parole.

5. 1939 N.M.Laws, ch. 33, § 1 (now codified at NMSA 1978, § 72-15-23 (Repl.Pamp.1985)). Rio Grande Compact.

6. 1945 N.M.Laws, ch. 51, § 1 (now codified at NMSA 1978, § 72-15-10 (Repl.Pamp.1985)). Costilla Creek Compact.

7. 1949 N.M.Laws, ch. 5, § 1 (now codified at NMSA 1978, § 72-15-26 (Repl.Pamp.1985)). Upper Colorado River Basin Compact.

8. 1951 N.M.Laws, ch. 4, § 1 (now codified at NMSA 1978, § 72-15-2 (Repl.Pamp.1985)). Canadian River Compact.

9. 1951 N.M.Laws, ch. 138, § 3 (now codified at NMSA 1978, § 11-10-1 (Repl.Pamp.1994)). Compact for Western Regional Cooperation in Higher Education.

10. 1959 N.M.Laws, ch. 112, § 1 (now codified at NMSA 1978, § 31-5-4 (Repl.Pamp.1984)). Western Interstate Corrections Compact.

11. 1967 N.M.Laws, ch. 201, § 2 (now codified at NMSA 1978, § 31-5-10 (Repl.Pamp.1984)). Interstate Compact on Mentally Disordered Offenders.

12. 1969 N.M.Laws, ch. 20, § 2 (now codified at NMSA 1978, § 18-2-20 (Repl.Pamp.1991)). Interstate Library Compact.

13. 1969 N.M.Laws, ch. 40, § 1 (now codified at NMSA 1978, § 11-9-1 (Repl.Pamp.1994)). Western Interstate Nuclear Compact.

14. 1969 N.M.Laws, ch. 57, § 1 (now codified at NMSA 1978, § 72-15-1 (Repl.Pamp.1985)). Animas-La Plata Project Compact.

15. 1971 N.M.Laws, ch. 270, § 1 (now codified at NMSA 1978, § 31-5-12 (Repl.Pamp.1984)). Agreement on Detainers.

16. 1972 N.M.Laws, ch. 19, § 1 (now codified at NMSA 1978, § 16-5-1 (Repl.Pamp.1987)). Cumbres and Toltec Scenic Railroad Compact.

17. 1973 N.M.Laws, ch. 238, § 2 (now codified at NMSA 1978, § 32A-10-1 (Repl.Pamp.1993)). Interstate Compact on Juveniles.

18. 1977 N.M.Laws, ch. 151, § 2 (now codified at NMSA 1978, § 32A-11-1 (Repl.Pamp.1993)). Interstate Compact on the Placement of Children.

19. 1982 N.M.Laws, ch. 89, § 1 (now codified at NMSA 1978, § 11-11-1 (Repl.Pamp.1994)). Interstate Mining Compact.

20. 1983 N.M.Laws, ch. 20, § 2 (now codified at NMSA 1978, § 11-9A-2 (Repl.Pamp.1994)). Rocky Mountain Low-Level Radioactive Waste Compact.

21. 1985 N.M.Laws, ch. 133, § 1 (now codified at NMSA 1978, § 40-7B-1 (Repl.Pamp.1994)). Interstate Compact on Adoption and Medical Assistance.

22. 1987 N.M.Laws, ch. 239, § 1 (now codified at NMSA 1978, § 11-12-1 (Repl.Pamp.1994)). Interstate Compact on Agricultural Grain Marketing.

Supreme Court, U.S.
FILED
MAY 9 1997
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No. 96-1617

In The

Supreme Court of the United States

October Term, 1996

PUEBLO OF SANTA ANA, PUEBLO OF SAN JUAN, PUEBLO OF TESUQUE, PUEBLO OF ACOMA, PUEBLO OF SANDIA, PUEBLO OF ISLETA, PUEBLO OF POJOAQUE, SAN FELIPE GAMING ENTERPRISE BOARD, and PUEBLO OF TAOS,

Petitioners,

vs.

JOHN J. KELLY, in his official capacity as United States Attorney for the District of New Mexico; JANET RENO, Attorney General of the United States; BRUCE BABBITT, United States Secretary of the Interior; the UNITED STATES of AMERICA; and the STATE of NEW MEXICO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE STATE OF NEW MEXICO IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether under the Indian Gaming Regulatory Act, 25 U.S.C. §§2701-2721 ("IGRA"), a *post hoc* [sic] challenge to the validity of a state's agreement to an approved tribal-state compact may be adjudicated directly in the courts, or must first be made to the Secretary of the Interior.

2. Whether under IGRA, a tribal-state compact that has been approved by the Secretary of the Interior and that is in effect may be judicially invalidated on the basis of a subsequent court determination that there was a state law defect in the state's agreement to the compact.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-33a) is published at 104 F.3d 1549. The opinion of the district court (Pet. App. 35a-67a) is published at 932 F.Supp. 1284.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1997. The petition for writ of certiorari was filed on April 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Errors In Petitioners' Statement

The Petitioners ("Tribes") have misrepresented the decisions below by stating that the District Court ruled that the compacts are invalid based upon the New Mexico Supreme Court decision in *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995) ("Clark"). (Pet. 7). In fact, the District Court found that it was not bound by the *Clark* decision and made its own examination of New Mexico's law "independent of the *Clark* case." (Pet. App. 54a) The District Court determined that *Clark* was decided correctly based upon the District Court's thorough examination of New Mexico law. (Pet. App. 54a-55a).

The Tribes misrepresent the decision of the Tenth Circuit Court of Appeals by saying the Tenth Circuit held

that the State was entitled to make its own decision whether its assent to the compacts is valid or binding under New Mexico law, regardless of the Secretary's role. (Pet. 7). In fact, the Tribes conceded at oral argument that *Clark* resolved the state law issues and that the Court was required, absent extraordinary circumstances, to accept that determination. (Pet. App. 31a). Even with this concession, the Tenth Circuit still examined the *Clark* decision and stated that "[W]e agree with that decision." (Pet. App. 32a). Both the District Court and the Tenth Circuit Court of Appeals examined the *Clark* decision independently and both found that it was decided correctly. Neither Court said that they were bound by the New Mexico Supreme Court's decision.

The Tribes misrepresent the Tenth Circuit's ruling by stating that the Tenth Circuit found that the Secretary's role in approving compacts under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701-2721 ("IGRA") was "ministerial." (Pet. 7). The Court below did not say that. What the Court of Appeals did say was the IGRA's requirement that a tribe enter into a compact with a state was separate from the Secretarial approval process. (Pet. App. 22a).

B. Background

Congress enacted IGRA in response to this Court's decision in *California v. Cabazon Bank of Mission Indians*, 480 U.S. 202 (1987). (Pet. App. 5a, n.3). Congress was searching for a way to regulate Indian gambling but it did not want to create a new federal responsibility. Congress found that Indian tribes should not regulate gambling

alone so Congress determined that it would rely upon the expertise of the states. Congress mandated that all Class III gambling be conducted under the terms and conditions of a compact entered into between each tribe and each state in which the tribe was located. 25 U.S.C. § 2710(d)(1)(C) (Pet. App. 82a).

Years before the compacts at issue were signed by the Tribes and New Mexico's Governor Gary Johnson, most of the Tribes began Class III gambling without compacts in clear violation of IGRA. (Pet. App. 7a and 42a). The United States Attorney for the District of New Mexico decided against taking enforcement action against the Tribes that had opened casinos in violation of IGRA (Pet. App. 8a and 43a) and unauthorized gambling has flourished ever since.

Forty-four days after taking office on January 1, 1995, Governor Gary Johnson entered into gambling compacts with thirteen New Mexico tribes, but only after the parties were forewarned that Governor Johnson did not have the authority to enter into compacts. (Pet. App. 26a, n.13).

After the Tribes and Governor Johnson signed compacts, the speaker of the New Mexico House of Representatives wrote to federal officials asking that the Secretary of the Interior not approve the compacts because Governor Johnson did not have the authority to enter into the compacts under New Mexico law. (Pet. App. 43a). Secretary Babbitt responded by saying that he was not going to determine complex issues of state law in reviewing compacts under IGRA but that "[W]e agree that compacts between Indian tribes and states are valid only if entered

into by the appropriate state officials." (Pet. App. 27a and 44a).

Secretary Babbitt approved the compacts and published his approval in the Federal Register on March 22, 1995. Immediately following the Secretary's approval, Governor Johnson's actions were challenged in an action before the New Mexico Supreme Court in the case of *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995). (Pet. App. 91a-126a).

The New Mexico Supreme Court ruled that Governor Johnson lacked the authority under the New Mexico Constitution to enter into gambling compacts pursuant to IGRA without legislative approval. In particular, the New Mexico Supreme Court ruled that the gambling activities that Governor Johnson was attempting to authorize contravened New Mexico public policy against wide-open commercial gambling. (Pet. App. 114a-115a). In an unrelated case, the New Mexico Supreme Court again found that casino-style gambling was against New Mexico's public policy and in violation of New Mexico's criminal laws. *Citation Bingo, Ltd. v. Otten*, 121 N.M. 205, 910 P.2d 281 (1995).

Only after *Citation Bingo* was decided did the United States seek to enforce the law. Threatened with closure by the United States, the Tribes sued Secretary Babbitt and other federal officials seeking a court declaration that their gambling activities were legal under IGRA. Specifically, the Tribes brought this action seeking a declaration of the validity of the Tribal-State gaming compacts they entered into with Governor Johnson. (Pet. App. 3a).

This case has reached this Court fifteen months after it was initiated in the District Court because all parties agreed that a final resolution of this dispute was needed quickly. In that spirit, the State requests that the Court deny the Tribes' petition as soon as possible.

ARGUMENT

The Tribes argue that the State of New Mexico must be bound to a compact which the State never entered into because the Secretary of the Interior approved the compact. The Tribes argue that the Secretary has the primary authority to determine compact validity. (Pet. 11). The Tribes' argument turns all known concepts of federalism and separation of powers on their heads and advocates a position that contravenes the Constitutions of the United States and the State of New Mexico.

1. It is fundamental that states retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). If Congress does intend to preempt the historic powers of the states, such an intent must be made clear. *Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989). The decision whether the governor or the state legislature should speak for a state is clearly one of those " . . . State decisions that 'go to the heart of representative government.' " *Gregory*, 501 U.S. at 461, quoting *Sugarman v. Doughall*, 413 U.S. 634, 647 (1973).

As the courts below observed, IGRA is silent on who is to speak for the state in negotiating and entering into

gambling compacts. Thus, Congress left to each state the decision as to who would enter into compacts. (Pet. App. 18a and 54a). Certainly, the duty imposed by IGRA to negotiate and enter into a compact with another sovereign is not the sort likely to be performed by state executive officers. *Seminole Tribe of Florida v. State of Florida*, ___U.S.___, 116 S.Ct. 1114, 1133, n. 17 (1996).

The New Mexico Constitution requires that the new Mexico legislature give its consent to any gambling compact entered into under IGRA. (Pet. App. 122a-123a). Thus, IGRA's requirement that a tribe must enter into a compact with a state for Class III gambling was not met because these compacts were not approved by the New Mexico legislature.

It is well settled proposition that when a state purports to bind itself, it must do so in accordance with its own constitution. In *West Virginia, ex rel. Dyer v. Sims*, 341 U.S. 22, 30 (1951), this Court said "[T]he issue before us is whether the West Virginia Legislature had authority, under her Constitution, to enter into a compact which involves delegation of power . . . " This Court has also found that when a state assumes jurisdiction over Indian land under an act of Congress, that assumption of power must be in accordance with state law. *Washington v. Confederated Bands and Tribes of the Yakima Indian Reservation*, 439 U.S. 463, 493 n.39 (1979).

Thus, the Courts below correctly decided that New Mexico had not entered into compacts with the Tribes because New Mexico's governor lacked the constitutional authority to bind the State to compacts.

2. The Tribes' argument that Secretary Babbitt should determine the validity of compacts is the opposite of what they argued in both the District Court and the Court of Appeals. This action was initiated in the District Court by the Tribes against Secretary Babbitt " . . . seeking a declaration of the validity of Tribal-State gaming compacts they had entered into with the State of New Mexico, under the . . . ("IGRA") . . . " (Pet. App. 3a). In response to the United States' argument that the Courts need not rule on compact validity, the Tribes argued in their reply brief to the District Court as follows:

> But by asserting that the Secretary can revoke his approval – an issue not presented by the facts of this case – by suggesting that the Secretary's approval does not apply to selected portions of the compacts, and by affirmatively asking this Court not to issue a ruling on the question of whether the compacts are valid, Defendants [United States] have attempted to mitigate the consequences of the compacts being in effect. Their position on these points is untenable.
>
> * * *
>
> Defendants [United States] attempt to raise an issue not presented by this case, that is, whether the Secretary has the authority to rescind his approval of a compact . . . [A]s noted, however, that issue is nowhere presented by the facts of this case. Record, Vol. VI, A1688 and A1693-94, n.4.

The interpretation of IGRA argued by the Tribes would allow a member of the federal executive branch to bind a state to a contract to which the state is not a party,

for the purpose of regulating Indian gambling. This would amount to the worst kind of coercion. To allow the Secretary to conscript a whole state to regulate Indian gambling runs afoul of the Tenth Amendment, because:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government . . . The Constitution instead "leaves to the several states a residuary and inviolable sovereignty," . . . reserved explicitly to the States by the Tenth Amendment. *New York v. United States*, 505 U.S. 144, 188 (1992) (citation omitted).

3. The Tribes' argument that the decision below represents a national disaster for tribes is untrue. First, IGRA is not a uniform statute. IGRA incorporates individual state laws and policies and individual tribal concerns in the compacting process. Each tribe is required to enter into compacts with the state in which it is located. 25 U.S.C. §2710(d)(1)(C). (Pet. App. 82a). Tribes may only engage in Class III gambling that is permitted by the state in which it is located. 25 U.S.C. § 2710(d)(1)(B). (Pet. App. 82). What gambling activities are allowed in Nevada will differ drastically from the gambling activities that occur in the neighboring State of Utah. Thus, the situation in New Mexico may have no relevance to any other state.

The situation in New Mexico is unique and does not necessarily implicate situations in other states where tribes have operated under state-tribal compacts for some time. As the courts below pointed out, most of the Tribes started their Class III gambling before they had compacts. (Pet. App. 7a and 42a). The Tribes were forewarned that

the compacts they were entering into with New Mexico's Governor may be invalid because the Governor lacked the authority to enter into compacts. (Pet. App. 26a, n.13). Secretary Babbitt warned all parties that the compacts would not be valid if the Governor lacked the authority to bind the State to compacts. (Pet. App. 27a and 44a).

Also, contrary to the Tribes' assertions, compacts are not subject to challenge by just anyone. (Pet. 8). Courts have dismissed cases challenging compacts when the person challenging the compact lacked standing. *Willis v. Fordice*, 850 F. Supp. 523, 529 (S.D. Miss. 1994); *Langley v. Edwards*, 872 F. Supp. 1531, 1533 (W.D. La. 1995).

4. The Tribes' argument that allowing challenges to federally approved compacts caused undue uncertainty for the Tribes cannot be used as a reason to override the doctrine of separation of powers. As this Court has said, "[C]onvenience and efficiency are not the primary objectives – or the hallmarks – of democratic government . . . " *I.N.S. v. Chada*, 462 U.S. 919, 944 (1983). On a practical level, the Tribes' argument that Secretary Babbitt can better handle these disputes between Tribes and States has not been demonstrated in this case. It has been almost two years since the New Mexico Supreme Court ruled that the Governor had no authority to enter into compacts. Since then, this litigation has progressed rapidly through the federal courts. During this period, Secretary Babbitt has not said whether or not he will withdraw his approval of the compacts. The courts have proven to be much more efficient in deciding these issues despite the fact that, as far back as April of 1995, Secretary Babbitt announced that compacts were not valid if they had not been properly executed by the State of New Mexico.

5. There is no conflict between the decision below and another circuit court that requires this Court to exercise its judicial discretion by granting Petitioners' Writ of Certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

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JUN 18 1997
OFFICE OF THE CLERK

(3)

No. 96-1617

In the Supreme Court of the United States

OCTOBER TERM, 1996

PUEBLO OF SANTA ANA, ET AL., PETITIONERS

v.

JOHN J. KELLY, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW MEXICO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Indian Gaming Regulatory Act of 1988 (IGRA) provides that Class III gaming is lawful if, inter alia, it is conducted in conformance with a Tribal-State compact that is "in effect." 25 U.S.C. 2710(d)(1)(C). IGRA further provides that a Tribal-State compact shall "take effect" when notice of approval of the compact by the Secretary of the Interior is published in the Federal Register. 25 U.S.C. 2710(d)(3)(B). In this case, the Secretary approved compacts entered into by the Governor of New Mexico and the petitioner Indian Tribes, but the New Mexico Supreme Court subsequently held that the Governor did not have authority under state law to enter into the compacts. The question presented is:

Whether the Tribal-State compacts remain "in effect" as a matter of federal law under IGRA, unless and until the Secretary withdraws his approval of the compacts, notwithstanding the decision of the New Mexico Supreme Court that the Governor did not have authority as a matter of state law to enter into the compacts.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1617

PUEBLO OF SANTA ANA, ET AL., PETITIONERS

v.

JOHN J. KELLY, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW MEXICO, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 104 F.3d 1546. The opinion of the district court (Pet. App. 35a-67a) is reported at 932 F. Supp. 1284.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1997. The petition for a writ of certiorari was filed on April 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, eight federally-recognized Indian Tribes and a gaming enterprise chartered by a ninth Tribe, brought this action against the United States and several federal officials seeking a declaratory judgment that Tribal-State gaming compacts they had entered into with the State of New Mexico under the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. 2701-2721, are valid and in effect.[1] This controversy arose initially as a result of a decision of the New Mexico Supreme Court holding that the Governor who had signed the compacts on behalf of the State lacked authority under state law to do so. The United States filed a counterclaim for a declaratory judgment that petitioners' gaming activities were illegal for a reason independent of the validity of the Tribal-State compacts—namely, because petitioners' gaming activities were not in any event permitted under New Mexico law for any purpose by any person, as required by IGRA. See 25 U.S.C. 2710(d)(1)(B). The United States also joined New Mexico as a party defendant, and took the position (contrary to the position of New Mexico) that, if the district court reached the issue, the compacts remain "in effect" under IGRA (see 25 U.S.C. 2710(d)(1)(C)) because the Secretary of the Interior has not withdrawn his approval of them.

The district court entered judgment against petitioners, holding that the compacts are invalid because

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[1] The plaintiff Tribes are: Pueblo of Santa Ana, Pueblo of San Juan, Pueblo of Tesuque, Pueblo of Acoma, Pueblo of Sandia, Pueblo of Isleta, Pueblo of Pojoaque, and Pueblo of Taos. The Pueblo of San Felipe sued through the San Felipe Gaming Enterprise Board.

the Governor lacked authority under state law to enter into them. Pet. App. 34a-67a. The court of appeals affirmed on that ground. *Id.* at 1a-33a. Neither court reached the further question of whether the Tribes' gaming activities were permitted under state law.

1. Congress enacted IGRA "in order to provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1119 (1996). Congress acted in response to this Court's decision in *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which held that state law is not applicable to gaming on an Indian reservation unless Congress so provides.[2] After *Cabazon*, "existing Federal law [did] not provide clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. 2701(3).

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[2] *Cabazon* involved California, one of the six States to which Congress has expressly granted jurisdiction over specified areas of Indian country in Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588. California was granted broad criminal jurisdiction over offenses committed by or against Indians in Indian country within the State under Section 2 of Public Law 280 (67 Stat. 588-589), while Section 4 (67 Stat. 589) granted a more limited civil jurisdiction. See generally *Bryan* v. *Itasca County*, 426 U.S. 373 (1976).

In *Cabazon*, the Court held that Public Law 280 did not permit application of California's criminal laws to the Tribes' gaming because the State's laws, while regulating gaming, did not prohibit the types of games that the Tribes in that case operated. 480 U.S. at 207-214. The Court also held that, absent federal legislation, the State's laws regulating gaming were preempted under the special principles applied to state laws affecting Indians, which require a balancing of the respective federal, tribal, and state interests. 480 U.S. at 214-222 (citing *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983)).

In enacting IGRA, Congress sought to establish a system for regulating gaming activities on Indian lands that would balance the competing interests of tribal and state governments. On the one hand, IGRA aims "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). On the other hand, IGRA contemplates a regulatory and supervisory role for the States and the federal government to prevent the infiltration of "organized crime and other corrupting influences." 25 U.S.C. 2702(2).

IGRA identified three classes of Indian gaming. 25 U.S.C. 2703(6)-(8). Class III gaming, at issue in this case, includes all gaming not otherwise defined as Class I or Class II gaming. 25 U.S.C. 2703(8).[3] It includes house-banked card games such as baccarat and blackjack, casino games such as roulette and craps, slot machines, electronic and electromechanical facsimiles of any game of chance, sports betting, parimutuel wagering and lotteries. 25 U.S.C. 2703(7)(B); 25 C.F.R. 502.4. Class III gaming is "the most heavily regulated of the three classes." *Seminole Tribe*, 116 S. Ct. at 1119-1120.

IGRA provides that Class III gaming activities are lawful on Indian lands only if those activities are (1)

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[3] Class I gaming consists of traditional Indian gaming, which is subject to the exclusive jurisdiction of the Tribes. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming consist of bingo, bingo-related games, and certain non-banking card games (*i.e.*, games such as poker that are played against other players, as distinguished from games such as blackjack that are played against the house). 25 U.S.C. 2703(7)(A). See *Seminole Tribe*, 116 S. Ct. at 1119 & n.1.

"authorized by [a tribal] ordinance" that is "approved by the Chairman" of the National Indian Gaming Commission, (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity," and (3) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State * * * that is in effect." 25 U.S.C. 2710(d)(1). The mechanism for entering into Tribal-State compacts is set forth at 25 U.S.C. 2710(d)(3)-(7). See *Seminole Tribe*, 116 S. Ct. at 1120. A compact does not "take effect," however, until it is approved by the Secretary of the Interior and notice of that approval has been published in the Federal Register. See 25 U.S.C. 2710(d)(3)(B). The Secretary may disapprove a compact only if it violates a provision of IGRA, any other provision of federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the United States to Indians. 25 U.S.C. 2710(d)(8)(B).[4]

As the court of appeals explained (Pet. App. 16a), a Tribe's "[f]ailure to comply with any one of the three conditions [in 25 U.S.C. 2710(d)(1)] means the class III gaming is subject to applicable [federal] criminal statutes," described below. Thus, if there is no Tribal-State compact "in effect" under IGRA, a Tribe may not engage in Class III gaming. 25 U.S.C. 2710(d)(1)(C). And even if there is such a compact, a Tribe may not conduct Class III gaming activities in

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[4] If the Secretary does not approve or disapprove a compact within 45 days of when it is presented to him, "the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of [IGRA]." 25 U.S.C. 2710(d)(8)(C).

a State that does not permit "such gaming for any purpose by any person." 25 U.S.C. 2710(d)(1)(B).[5]

If a particular form of gaming is illegal in a State, then federal criminal laws apply to ban such activity on Indian lands. Those federal laws include the Johnson Act, 15 U.S.C. 1171-1178, which prohibits gaming devices in Indian country[6]; a criminal provision enacted as part of IGRA, 18 U.S.C. 1166, which assimilates and applies to Indian country all laws of the State "pertaining to the licensing, regulation, or prohibition of gambling"; and the Organized Crime Control Act, 18 U.S.C. 1955, which prohibits gaming that is unlawful under state law.

2. a. The essential facts of this case are undisputed. See Pet. App. 6a-14a, 42a-45a. Briefly, in 1995 Governor Johnson of New Mexico and 13 Indian Tribes, including petitioners, signed compacts that provided for the Tribes to conduct Class III gaming. The compacts purported to authorize petitioners to engage in all forms of casino-style gaming, including slot machines, video gaming devices and various table games. Pursuant to 25 U.S.C. 2710(d)(8), the Secretary approved the compacts. The compacts thereupon "[took] effect" for purposes of IGRA. 25 U.S.C. 2710(d)(3)(B).

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[5] We discuss the latter requirement (that the gaming be located in a State that "permits such gaming for any purpose by any person") in the brief for the United States as amicus curiae that we filed on June 9, 1997, in response to the Court's invitation in *Sycuan Band of Mission Indians* v. *Wilson*, petition for cert. pending, No. 96-1059.

[6] In order for a gaming device to be legally possessed or operated in Indian country, the bar of 18 U.S.C. 1175 must be lifted through a Tribal-State compact. See 25 U.S.C. 2710(d)(6).

Subsequently, however, the New Mexico Supreme Court ruled that Governor Johnson had exceeded his authority in entering into the compacts; accordingly, it held them to be "without legal effect" as a matter of state law. *State ex rel. Clark* v. *Johnson*, 904 P.2d 11, 27 (N.M. 1995) (reproduced at Pet. App. 91a-126a). Of particular concern to the *Clark* court was the scope of gaming permitted by the compacts. The court discussed the question whether casino-style gaming was legal under state law and, without ruling specifically on what forms of gaming were permitted in the State, concluded that the compacts authorized more forms of gaming than were permitted by state law. *Clark*, 904 P.2d at 21.

Later in 1995, the New Mexico Supreme Court issued another opinion that addressed the legality of gaming in the State. See *Citation Bingo, Ltd.* v. *Otten*, 910 P.2d 281 (N.M. 1995). In *Citation Bingo*, a case that concerned whether electronic hand-held bingo devices were permitted by state law, the New Mexico Supreme Court clearly indicated that casino-style gaming, and in particular those forms of gaming conducted by petitioners, was unlawful in New Mexico.

b. Following the *Citation Bingo* decision, the United States Attorney for the District of New Mexico directed petitioners to close their casinos or face forfeiture proceedings. Petitioners then filed the instant suit seeking a declaratory judgment that the compacts were valid and that the Tribes were engaged in forms of gaming permitted by state law.[7] The

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[7] In addition to their claims under IGRA, the Tribes asserted that the United States' actions violated the trust responsibility and deprived them of due process, and that the

United States counterclaimed, contending that petitioners' gaming operations were illegal—whether or not the compacts were valid or in effect—and urged the district court to enter judgment against petitioners on that basis. The United States accordingly suggested that the district court need not reach the issue of the validity of the compacts. The United States further argued, however, that if the court were to reach that issue, the compacts remained "in effect" for purposes of IGRA unless and until the Secretary of the Interior withdrew his approval of them. The State of New Mexico argued that petitioners' gaming operations were illegal on both grounds—*i.e.*, that the compacts were invalid in light of *State ex rel. Clark* v. *Johnson*, and that such Class III gaming was not permitted in New Mexico in any event under both *Clark* and *Citation Bingo*. See Pet. App. 14a-15a, 44a-45a.

The district court held that the compacts were invalid on the ground that they had not been validly "entered into" by the State. See 25 U.S.C. 2710(d)(1)(C). The district court did not accept the United States' argument that the compacts were "in effect"—for purposes of satisfying that condition under IGRA for Class III gaming to be lawful in the State—unless and until the Secretary withdraws his approval. Pet. App. 52a. The court did not reach the issue of whether casino-type gaming is permitted in New Mexico. *Id.* at 60a. The court stayed its judgment pending appeal. *Id.* at 34a, 81a.

United States should be estopped from seeking to enforce federal gaming laws against them. Those claims were rejected by the district court (Pet. App. 61a-66a), and are no longer presented by petitioners.

c. The court of appeals affirmed, likewise holding that the Tribal-State compacts were invalid because the Governor lacked authority under state law to enter into them. Pet. App. 1a-33a. Rejecting the United States' position that the compacts remain "in effect" for purposes of IGRA, the court of appeals held that a compact that was not validly "entered into" by a State cannot "go into effect, via Secretarial approval, under IGRA." *Id.* at 22a, 32a. Like the district court, the court of appeals found no need to reach the United States' alternative argument that the tribal gaming at issue is illegal under federal law in any event because New Mexico does not permit such Class III gaming activities for any purpose by any person. *Id.* at 33a. The court of appeals, too, stayed its judgment pending "final resolution of this matter" in the court of appeals or in this Court. *Ibid.*

3. As petitioners note (Pet. 20 n.13), since the court of appeals' decision, the New Mexico Legislature has passed, and the Governor has signed, a law that offers a compact to the Tribes and that would, under specified circumstances, permit the Tribes to engage in casino-style gaming.[8] H.B. 399, 43d Leg., 1st Sess. (1997). No compacts under that new state law have yet been submitted to the Secretary for his approval under IGRA.

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[8] Section 70 of H.B. 399 provides as follows:

> DELAYED EFFECTIVE DATE.—The provisions of the Gaming Control Act shall be effective on the date that a tribal gaming compact agreed upon and executed by an Indian nation, tribe or pueblo and the state is approved pursuant to the provisions of the Indian Gaming Regulatory Act, 25 USCA Section 2701, et seq.

ARGUMENT

We agree with petitioners that the court of appeals erred in holding that the Tribal-State compacts that petitioners and the Governor of New Mexico signed are not "in effect" for purposes of the Indian Gaming Regulatory Act, 25 U.S.C. 2710(d)(1)(C). That question, however, does not warrant review by this Court. There is no circuit conflict on the question. Moreover, the result reached by the court of appeals is correct, because, as the United States argued below, petitioners' Class III gaming activities were unlawful on the independent ground that they were not permitted in New Mexico for any purpose by any person. And since the time of the court of appeals' decision, New Mexico has enacted a new law that expressly provides for Tribal-State compacts.

1. Both courts below correctly recognized that whether a Tribal-State gaming compact satisfies the requirements of IGRA—thereby satisfying one of the three conditions under 25 U.S.C. 2710(d)(1) for Class III gaming to be legal under IGRA—is a federal question. Pet. App. 28a-29a, 52a. A compact provides a framework for legal gaming by a Tribe when it is "in effect." A compact "take[s] effect" under IGRA "only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register."[9] 25 U.S.C. 2710(d)(3)(B). In deciding whether to approve the compact, the Secre-

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[9] As pointed out above (see note 4, *supra*), if the Secretary does not approve or disapprove a compact within 45 days of its submission to him, "the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of [IGRA]." 25 U.S.C. 2710(d)(8)(C).

tary is directed to consider the provisions of IGRA, other provisions of federal law, and the trust obligations of the United States to Indians. 25 U.S.C. 2710(d)(8)(B).

IGRA is silent concerning the circumstances, if any, under which a compact that has been entered into by a State and Tribe, and "take[s] effect" under IGRA upon approval by the Secretary, may thereafter become ineffective as a matter of federal law. As a general rule, however, the power of a federal official to make a decision carries with it the power to reconsider that decision. *Trujillo* v. *General Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (citing *Albertson* v. *Federal Communications Comm'n*, 182 F.2d 397, 399 (D.C. Cir. 1950)) ("The power to reconsider is inherent in the power to decide * * * in the absence of any specific limitation."). In light of that general rule and IGRA's silence on the point, we believe that the Secretary of the Interior has the authority to withdraw his approval of a compact. In doing so, the Secretary presumably would consider the same statutory factors that he is to consider in deciding whether to approve or disapprove a compact in the first place.[10]

As a result of the New Mexico Supreme Court's decision in *Clark* v. *Johnson* that the Governor did not have authority under state law to enter into the compacts on behalf of the State, it is clear that the compacts are not in effect for state law purposes. We may assume as well that because of the Governor's

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[10] Where a Tribe has a strong reliance interest resulting from its investment in gaming operations based on the Secretary's approval of a compact, the Secretary could take that circumstance into account in considering whether to withdraw his approval.

lack of authority, the State is not bound to adhere to any affirmative obligations that it assumed under the compacts as written. It is a distinct question, however, whether the compacts remain "in effect" for the more limited purpose of satisfying one of the three conditions in 25 U.S.C. 2710(d)(1) for Class III gaming by a Tribe to be legal as a matter of *federal* law. By virtue of Congress's plenary power over Indian affairs, a State has no inherent sovereign power to regulate gaming on Indian lands within its borders. Congress nevertheless chose to afford the State an opportunity, through the Tribal-State compacting process, to play a role in determining the circumstances under which such gaming will be permitted.[11] But because the compacting process is entirely a creature of federal law in an area in which the States would have had no authority in the absence of IGRA, there will be no substantial infringement on state sovereignty if a compact entered into by the Governor of a State and approved by the Secretary of the Interior remains "in effect" for purposes of IGRA despite a subsequent determination that the Governor lacked authority to enter into the compact as a matter of state law. As we have just explained, the only result would be to satisfy one of the conditions Congress has specified to render the gaming lawful under federal law, not to commit any sovereign authority of the State.

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[11] If the negotiating process fails to result in a compact, the Secretary of the Interior is authorized to promulgate procedures "under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." 25 U.S.C. 2710(d)(7)(B)(vii).

Of course, a determination that the Governor lacked authority under state law to enter into a compact in the first place would be a relevant factor for the Secretary to consider in deciding whether to withdraw his approval of a compact.[12] In this case, however, the State of New Mexico has not requested the Secretary to reconsider his approval of the compacts at issue here on that ground. Unless and until the Secretary does so, the compacts remain "in effect" for purposes of IGRA. This understanding of the Secretary's authority advances the purposes of IGRA by preventing one party to a compact from exercising unilateral power over the compact's status, and by promoting certainty and consistency.

2. Although we believe that the court of appeals erred in holding that the compacts signed by petitioners and the Governor of New Mexico are invalid as a matter of federal law, that issue does not warrant further review. There is no conflict among the circuits for this Court to resolve. The Tenth Circuit is the first court of appeals to rule on the issue petitioners seek to present. Although the United States shares petitioners' concern that the holding below may encourage "collateral attacks" on Tribal-State gaming compacts under IGRA (Pet. 7-8), if such

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[12] The Secretary presumably would give that factor great weight if, for example, the State was rendered unable to carry out an important role assigned to it under the compact in regulating gaming and in protecting Indians and other members of the public from crime and corrupting influences. See 25 U.S.C. 2702(2). On the other hand, the Secretary would not be compelled to withdraw his approval if, for example, the state-law deficiency in the compacting process concerned a ministerial requirement and the effect on gaming regulation and other federal interests was not substantial.

lawsuits do occur, the issue may be decided differently by other courts of appeals. There accordingly is no reason for the Court to depart from its usual practice of awaiting further developments in the lower courts, rather than granting review in the first case raising a particular legal issue. Moreover, as we argued below, the Tribes' Class III gaming operations were unlawful for the independent reason that such gaming is not in any event permitted in New Mexico "for any purpose by any person." See 25 U.S.C. 2710(d)(1)(B).

Finally, the State Legislature has enacted a new law that authorizes Tribal-State compacts and that would permit Class III gaming by Tribes under certain conditions. N.M. H.B. 399, 43d Leg., 1st Sess. (1997). That new law may provide a means for petitioners to engage legally in casino-type gaming. Alternatively, the new law may spawn more disputes and litigation. In either event, the recent developments in New Mexico may significantly affect the practical importance of the particular compacts at issue here, the decisions of the New Mexico Supreme Court in *Clark* and *Citation Bingo*, and the question presented by petitioners to this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

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October Term, 1996

PUEBLO OF SANTA ANA, PUEBLO OF SAN JUAN, PUEBLO OF TESUQUE, PUEBLO OF ACOMA, PUEBLO OF SANDIA, PUEBLO OF ISLETA, PUEBLO OF POJOAQUE, SAN FELIPE GAMING ENTERPRISE BOARD, and PUEBLO OF TAOS,

Petitioners,

v.

JOHN J. KELLY, in his official capacity as United States Attorney for the District of New Mexico; JANET RENO, Attorney General of the United States; BRUCE BABBITT, United States Secretary of the Interior; the UNITED STATES of AMERICA; and the STATE OF NEW MEXICO,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Tenth Circuit

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ARGUMENT

The Brief in Opposition of the State of New Mexico (hereinafter, "the State") demonstrates why this Court should grant review of this case. According to the State, a state or federal court can invalidate the Secretary of the Interior's approval of a tribal-state gaming compact based on some state law defect at any time after the compact has taken effect, no matter how much a tribe has invested in reliance on the compact. Such a determination, the State claims, can be based on novel state law theories that were unknown at the time the compact was entered into, and it can come at the urging of any person who decides to sue, whether or not the tribe is a party to the case.

That view – the view adopted by the court below – undermines the security of every tribal-state gaming compact that has been approved since IGRA took effect, and it eviscerates the authority Congress conferred on the Secretary to determine compact validity. Petitioners ("the Tribes") urge that any claim that a compact is void based on an asserted state law defect falls within the Secretary's exclusive statutory authority to consider issues of compact validity, and thus must first be presented to the Secretary. The Secretary's primary jurisdiction over such claims is inherent in the Secretary's explicit authority to approve compacts under IGRA. The United States fully supports that view of the statute.

The Secretary's power to consider claims of compact invalidity is, of course, subject to judicial review. The state courts, moreover, have the ultimate authority to decide issues of state law. But the Secretary must retain

the primary authority to decide whether a belated assertion of some state law defect warrants voiding a compact that has already taken effect under IGRA. The flexibility of an administrative remedy will often be called for. *See, e.g.*, United States Br. at 11 n.10.

In commencing Class III gaming activity, and making the substantial investment such activity necessitates, a Tribe must be able to rely upon the validity of its approved compact. But if, as the State claims here, some subsequently discovered state law defect never raised with the Secretary can render an approved compact void *ab initio*, federal laws may have been violated inadvertently. Huge investments may be at risk, and important tribal commitments may be jeopardized. Congress gave the Secretary exclusive power to determine compact validity, and that power must be preserved here, to enable the Secretary to fashion a reasonable remedy in the face of a claim of invalidity based on state law factors. If a State, or any one of its citizens, can end-run the Secretary's authority by taking such claims directly to the courts, the regularity of the administrative process will be displaced by ad hoc judicial intervention, thoroughly subverting the intent of Congress in the Act.

The State claims, however, that the issue presented here is unique to New Mexico, because compacts differ from state to state, and state laws vary. N.M. Br. at 8-9.[1]

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[1] The State also argues that standing considerations would serve to protect approved compacts from attack, but this claim seems particularly disingenuous. In *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995), the New Mexico Supreme Court decision that declared the New Mexico compacts void

The State is mistaken. The issue presented here has nothing to do with state laws or compact terms, but rather with the primary jurisdiction of the Secretary to determine in the first instance whether such state law issues might affect the validity of an approved compact. That is plainly a federal question, arising directly from the language and structure of IGRA, and it applies across the board to any challenge to any approved compact. The court below resolved that question in a manner that exposes every compact to attack, on whatever state law grounds. Those attacks, moreover, are beginning to multiply.[2] Millions of dollars in tribal investments, many millions more in tribal services and programs, tens of

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because of the Governor's lack of authority, the court held that *anyone* had standing to bring an action such as that one, as long as the issues raised were of sufficient "public importance." Pet. App. at 99a-100a. Pending challenges to the validity of compacts entered into in Arizona and Kansas have also been brought by private parties, on similar theories. *See* n.2, *infra*.

[2] As predicted in the Tribes' original Petition, at 10, the parties who unsuccessfully asked the Arizona Supreme Court to entertain their attack on the validity of the 16 approved Arizona compacts have renewed their attack in an action recently filed in Arizona Superior Court. *Sears v. Symington*, No. CV97-08942 (Maricopa County Super.Ct., filed May 15, 1997). The petitioners in that case claim that Arizona's constitution prevents even the legislature from approving the tribal gaming compacts in effect in Arizona, and in a brief submitted with their complaint the petitioners rely largely on the decision below and *Clark*, arguing that the compacts can be declared illegal by a state court based on state law doctrines. Meanwhile, the challenge to the approved Kansas compacts is proceeding, like the Arizona case, and like *Clark*, without joinder of the affected Tribes as parties. *Bartelli v. Graves*, No. 97-CV-183 (Shawnee County Dist.Ct., filed February 28, 1997). Finally, just before this brief was filed, gaming opponents in New Mexico

thousands of jobs, and the economic futures of tribes and their members, are now in jeopardy. This is clearly an issue of national importance.

The State errs in claiming that State power would be undermined by recognizing the Secretary's authority to determine the validity of a compact. Unlike *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which involved congressional restraints on State power in an area "of the most fundamental sort for a sovereign entity," *id.* at 460, enforcing the Secretary's primary jurisdiction to consider challenges to approved compacts does not interfere with any inherent, traditional or fundamental State power. Rather, it is fully consistent with Congress's plenary, supreme, and exclusive constitutional authority to regulate tribal affairs within Indian country. *Seminole Tribe v. Florida*, 116 S.Ct. 1114, 1124, 1126 (1996). While Congress invited the States to become involved in the regulation of tribal gaming in IGRA, it surely retained the discretion to vest the Secretary with conclusive authority to determine whether a compact between a State and a Tribe has been

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launched a new state court attack on compacts that would be signed under the legislation passed by the 1997 New Mexico legislature. *State ex rel. Coll v. Montoya*, No. SF-97-1420(C) (1st Judic.Dist.Ct., filed June 19, 1997). The plaintiffs claim that this legislatively approved compact violates the New Mexico constitution in various respects, and also that it violates IGRA, and they urge that the state court should decide these questions, *not* the Secretary. Under *Clark* and the decision below, the state court's decision in this case, even on federal law issues, could void these compacts, regardless of secretarial approval, and lead to a gaggle of conflicting state court rulings on critical federal law issues.

executed in accordance with the requirements of the Act, and should thus be put into effect.

Nor does the Secretary's power under IGRA to give effect to a sufficient manifestation of State assent to a compact run afoul of the Tenth Amendment considerations articulated in *New York v. United States*, 505 U.S. 144 (1992). Congress has not forced the State to agree to a compact with the Tribes, and IGRA carefully preserves the State's right to refuse to agree to a compact under any circumstances. 25 U.S.C. § 2710(d)(7)(B). The Governor's execution of these compacts, moreover, was an open, public, voluntary action of a state official, and indeed, was in express fulfillment of a campaign commitment.

In *New York*, this Court held that the power of federal courts to interpret and enforce against the States otherwise valid federal laws in no way invades any Tenth Amendment power of the States. *Id.* at 178-179. Here, similarly, the question whether a governor's assent to a compact sufficiently manifests the concurrence of the State, absent any extant governing determination that the Governor lacks such authority, is one of interpretation of IGRA. The act of statutory interpretation itself can in no way amount to an imposition on some reserved power of the State.

The United States fully agrees with the Tribes that the court of appeals erred in holding that the Tribes' compacts are invalid, and it shares the Tribes' concern that that decision "may encourage 'collateral attacks' " on approved compacts. United States Br. at 13. Nonetheless, while acknowledging the need to prevent "one party to a

compact from exercising unilateral power over the compact's status," and to promote "certainty and consistency" in tribal gaming, *id.* at 13, the United States argues that the decision below was correct on a ground not reached by any court below, that the tribes' gaming activities are nevertheless not "permitted" by the State. *Id.* at 13-14. *See* Petition at 6 n.4. Aside from the inherent contradiction in the claim that even though the State has assented to compacts that expressly authorize casino-style gaming, it does not "permit" such gaming, the claim is refuted by the legislation enacted by the 1997 New Mexico legislature, discussed in the very next paragraph of the United States' brief. United States Br. at 14. That legislation expressly authorizes compacts permitting all of the forms of gaming allowed under the 1995 compacts at issue here, albeit under Draconian regulatory and financial requirements and restrictions. *See* Petition at 20 n.13. It also allows slot machines to be operated at racetracks and certain private clubs in the State. The United States' claim of illegality, thus, if it ever had any merit, has been thoroughly obviated by this legislation.[3]

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[3] The United States also complains that since there is no conflict among the circuits on the issue raised here, this case is not appropriate for review. This point reflects a misunderstanding of the concern here. The cases that have already arisen, and that are poised to arise in the future, are *state* court decisions deciding federal law questions of compact validity (but often under the guise of state constitutional questions, thus precluding review in this Court), and preempting secretarial authority over those issues. Several such cases are cited and discussed in the Tribes' Petition at 8-9 n.5. There are also conflicting federal court decisions, that the Tribes also noted. *Id.* at 8-9 n.5. The circumstances that led this case to

Especially given the onslaught of state court challenges to approved compacts that is already underway, *see supra* at n.2, this Court's intervention is needed now, to preserve the federal administrative authority intended by Congress to govern determinations of compact validity, and to restore some security and certainty to the reliance interests of tribes that have undertaken Class III gaming activities on the basis of approved compacts.

CONCLUSION

For the reasons stated, this Court is respectfully urged to grant the writ and to review the opinion and order of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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be filed in federal court were unusual, and may not be repeated. In short, given the nature of the issue presented, waiting for additional federal court of appeals decisions before this Court undertakes consideration of the issue merely invites more state court attacks on approved compacts.

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